Supreme Court, U.S.
FILED

94 410 SEP 6 1994

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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HARRY L. REYNOLDS, JR.
Petitioner,
v.
INTERNATIONAL AMATEUR ATHLETIC FEDERATION,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 6, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

135 pp

QUESTION PRESENTED

Whether a State's exercise of personal jurisdiction over a nonresident defendant (with a participating U.S. agent) who, acting abroad, intentionally directs tortious acts at a resident plaintiff and promotes the widest possible dissemination of defamatory statements, predictably causing devastating financial injury to the plaintiff in the forum State, comports with "traditional notions of fair play and substantial justice" as required by the Due Process Clause.

LIST OF PARTIES AND RULE 29.1 LIST

The caption of the decision below, App. 1a, contains the names of the parties. To petitioner's knowledge, no party is incorporated, has issued shares to the public, or has any subsidiary or parent companies.

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PETITION FOR A WRIT OF CERTIORARI

On June 20, 1992, Justice John Paul Stevens granted an emergency application allowing petitioner, Harry L. "Butch" Reynolds, Jr. ("Reynolds"), to compete in the 1992 United States Olympic Trials in New Orleans, Louisiana. 112 S. Ct. 2512. Later that same day, the full Court declined to disturb Justice Stevens' Order. 112 S. Ct. 2986. Reynolds thereafter competed and qualified for a place on the 1992 United States team, but was nevertheless barred from joining the team in Barcelona by respondent The International Amateur Athletic Federation ("IAAF"). The IAAF also barred Reynolds from participating in track and field events worldwide for four months after the Olympic games as punishment for seeking the protection of the United States courts.

The case comes back to the Court now on a petition for certiorari from the Sixth Circuit's decision of May 17,

1994, depriving petitioner of his subsequent judgment against respondent for damages and permanent injunctive relief. The court of appeals found that no personal jurisdiction over respondent existed. In so holding the court declined to attribute significance to the fact that Reynolds is a resident of the forum and was when the IAAF directed intentional torts at him, including a most damaging defamation concerning alleged drug use. In that respect, the holding represents a substantial erosion of *Calder v. Jones*, 465 U.S. 783 (1984) and places the Sixth Circuit in conflict with several other circuits.

This case therefore presents an ideal opportunity for the Court to resolve the conflicts which have developed among the circuits, including now the Sixth Circuit, as to the proper application of *Calder* where intentional tortious conduct is concerned. Moreover, because the logic of *Calder* makes Ohio's exercise of jurisdiction over the IAAF proper in this case, review not only will permit the Court to undo a profound miscarriage of justice, but also to establish an important precedent in the area of personal jurisdiction.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a-22a, is reported at 23 F.3d 1110. The July 13, 1993 Opinion and Order of the district court, App. 24a-47a, is not reported. The December 3, 1992 order of the district court, App. 48a-75a, is not reported. The June 19, 1992 order of the district court, App. 76a-98a, is reported at 841 F. Supp. 1444.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1994. The order of the court of appeals denying Reynolds' petition for rehearing was entered on July 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

U.S. Const., Amend. XIV § 1.

STATEMENT OF THE CASE

Petitioner, Harry L. "Butch" Reynolds, Jr. ("Reynolds"), is a world class track and field athlete. He holds the world record at the 400 meter distance and shares the world record in the 4 x 400 meter relay. He was a gold and silver medalist at the 1988 Olympic Games in Seoul, Korea and is now training to become a member of the 1996 United States Olympic team. App. 2a. He has been a citizen and resident of Ohio since he was a child.

Respondent IAAF is an unincorporated business association with its headquarters in Monaco, Monte Carlo. Through comprehensive rules, which incorporate eligibility standards, and sizeable monetary subsidies, it exercises pervasive control over track and field athletes and competitions throughout the world, including within the United States. A significant portion of the IAAF's huge annual income comes from United States corporate sponsors and from broadcast revenue derived from the United States. Its staff and principal officers regularly visit and transact business in the United States. One of its principal officers resides in Indianapolis, Indiana. It is the position of the IAAF that it alone can make eligibility determinations regarding track and field athletes, and that its decisions are not subject to review by the judicial authority of any nation. *Id.*

The Athletics Congress of the United States, Inc. ("TAC"),[1] the United States national governing body for track and field, is a member of the IAAF. As its President testified in this case, TAC acts generally as the "ex-

clusive representative" of the IAAF in the United States. The IAAF can and does tell TAC what to do concerning track and field and, as the evidence in this case shows, TAC always toes the line. As the court of appeals held, TAC specifically acted as the IAAF's agent with respect to Reynolds for all purposes relevant to this petition. App. 14a-15a.

IAAF Rules proscribe the use of many drugs, including anabolic steroids, and impose severe penalties upon athletes found using any of them. To monitor potential use of banned substances, all track and field athletes are required to submit to frequent urine tests. The IAAF and its agents test athletes following races in which the athletes participate and also test them randomly throughout the year. If an athlete's urine sample is confirmed "positive" for a prohibited substance, IAAF Rules require that the athlete be "suspended" from competition pending a "hearing" by his or her national governing body. The same Rules contemplate that the result of the hearing process will determine the athlete's "eligibility" status.

Beginning in 1987, Reynolds submitted to all IAAF Rules, without dispute, and was permitted to run in international track and field events. Until 1990, he was subjected to many urine tests, both in-competition and randomly out-of-competition, and never had any problem.

On October 18, 1990, Reynolds received a stunning notice from TAC, as agent for the IAAF, that he was suspended from all competition because a urine sample supposedly taken from him following a race in Monte Carlo, Monaco on August 12, 1990 had tested positive for the prohibited anabolic steroid nandrolone. Reynolds has never taken a steroid in his life. The notice from TAC came in a letter which recited the supposed IAAF finding and the fact of his suspension, and offered Rey-

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[1] TAC has changed its name to U.S.A. Track and Field. Because that organization is referred to as TAC in the record, Reynolds will continue to use that reference herein.

nolds the "hearing" before a TAC panel required by IAAF Rules. The letter further informed Reynolds that if he requested such "hearing" within 48 hours, all information about the test results would be kept confidential until the hearing process had run its course. The letter was sent to Reynolds at his home in Columbus, Ohio.

Because he was innocent and acutely aware of the harm to his reputation that would flow from any publication of so shocking an allegation, he requested the described hearing, and specifically requested confidentiality. Three weeks later, however, before a hearing date had even been set, the IAAF held a press conference in London, England at which it announced to the worldwide media that Reynolds had tested positive for a banned steroid. Because of Reynolds' prominence in track and field, the story was published and republished throughout the world, including within the United States and in Ohio. The story ran the very next day and for many following days. Major newspapers, such as the *New York Times* and the *Washington Post*, carried the story, as did Ohio newspapers, including the *Columbus Dispatch* and the *Cleveland Plain Dealer*. The broadcast media also prominently featured the story. Since the initial press release, the IAAF has restated the allegation on numerous occasions in a variety of contexts.

The effect of the publication was exactly what Reynolds feared. His endorsement contracts were cancelled. Prospective sponsors refused to have further dealings with him. Since the pre-hearing suspension was already in effect, he was barred from all track and field competitions. His income dropped from over $300,000 per year to zero virtually overnight. Personally and professionally, Reynolds was instantaneously ruined.

Because he knew he was innocent, Reynolds determined to fight back. He had never used any illegal substance and assumed that a mistake had been made. He promptly requested from the IAAF and TAC access to

the residue of the urine sample attributed to him and all of the scientific data which the testing had generated. The IAAF refused him access to the urine sample residue and declined to test that residue again itself. The IAAF also reported to Reynolds that it had given TAC the scientific documents it deemed relevant and advised Reynolds that he should ask TAC for those documents. TAC provided Reynolds with a very limited amount of scientific documentation, mostly information generated by the observer who it had sent to watch the testing. Because the hearing panel subsequently appointed by TAC declined to help him obtain production of the rest of the scientific data, Reynolds sought the assistance of the federal court in an action styled *Reynolds v. The Athletics Congress of the United States, Inc.*, No. C-2-91-003 (S.D. Ohio, Mar. 19, 1991) ("*Reynolds I*"). The IAAF appeared in *Reynolds I* and filed a motion to dismiss for lack of personal jurisdiction.

While *Reynolds I* was pending, and as a consequence of it, TAC released to Reynolds documentation which the IAAF had given to it concerning the disputed test. The revelations in that evidence can only be described as shocking.

First, 70% of the scientific data generated during the testing process had been destroyed by the Paris laboratory which had done the testing. Mandatory International Olympic Committee ("IOC") laboratory protocols require that data concerning a disputed test be maintained and available for inspection for five years. App. 64a. More importantly, the 30% provided actually vindicated Reynolds.

As the district court noted in its extensive opinion below, Reynolds' sample had been divided into "A" and "B" portions for testing. The "A" portion was described in the scientific section of the eventual report from the laboratory to the IAAF as having come from an East German athlete, not from Reynolds. App. 58a. With

respect to the "B" portion, the data compelled a conclusion either that the laboratory did *not* find nandrolone in the urine or that the "B" portion was *not* from the same person as the "A" portion. App. 58a-60a. The pervasive failure of the laboratory to follow required IOC procedures during the testing process, and the fact that 70% of the data was missing, literally made it impossible to tell with scientific certainty which of those two conclusions was accurate. But in either event it was clear that there was no basis to conclude that Reynolds had failed his drug test.

In addition, at the time it suspended Reynolds, the IAAF had available to it documentation confirming the absence of nandrolone in a sample of Reynolds' urine taken from him and tested by another laboratory following a race a week later than the one at which the disputed sample was taken. As a matter of science, it is impossible for a person to have nandrolone present in his or her urine in the concentration reported by the laboratory respecting the August 12 sample, and be completely free of it only one week later. App. 65a.

As is apparent, the scientific data surrendered did not support the allegations against Reynolds at all and what it disclosed about the IAAF testing process were far more than mere "technical" deficiencies. Reynolds did not, however, get to present this evidence to the district court at that time. On March 19, 1991, the district court held in *Reynolds I* that he had failed to exhaust his administrative remedies and therefore stayed the action pending such exhaustion. Reynolds appealed that decision and on June 11, 1991, the Sixth Circuit vacated the decision of the district court and ordered the entire case dismissed on the ground that exhaustion of administrative remedies is a precondition to the exercise of subject matter jurisdiction. *Reynolds v. The Athletics Congress of the United States, Inc.*, 935 F.2d 270 (6th Cir. 1991). Reynolds remained subject to his original suspension from track and field while all of this occurred.

Thereafter, Reynolds exhausted his administrative remedies. In June 1991, pursuant to the Amateur Sports Act of 1978, 36 U.S.C. § 371 *et seq.* and the United States Olympic Committee ("USOC") Constitution, Reynolds and TAC participated in an independent arbitration before the American Arbitration Association ("AAA") in Columbus, Ohio. This arbitration was precipitated by Reynolds' desire to compete in a then upcoming "protected competition" in the United States under USOC auspices. The AAA proceeding took a day to complete and involved the live testimony of several witnesses for Reynolds who reported the above-described evidence in detail. Even though the scientific data exonerated Reynolds, TAC defended the charge of steroid use on behalf of the IAAF. Manfred Donike, a member of the IAAF Doping Commission and the IOC Medical Committee, submitted a written declaration as testimony against Reynolds. On June 10, 1991, based upon the scientific evidence, the arbitrator rendered a decision that completely exonerated Reynolds:

> The arbitrator finds that Respondent's suspension of Mr. Reynolds was improper; that there is clear and convincing evidence that the "A" sample and the "B" sample did not emanate from the same person and the "B" sample did not confirm the "A" sample; that there is substantial evidence that neither the "A" sample nor the "B" sample emanated from the Claimant, and that the Claimant should be declared eligible to compete . . .

App. 50a. Nevertheless, because the AAA arbitration was not conducted under IAAF Rules (or subject to its control), both TAC and the IAAF refused to accept it as the "hearing" which IAAF Rules mandated.

TAC, acting as the agent of the IAAF, eventually scheduled the IAAF hearing for September 13, 1991. That hearing was held in Columbus, Ohio. Five live witnesses testified, including two expert witnesses (one of

whom, again, was IAAF representative Manfred Donike). Hundreds of pages of exhibits were introduced and TAC again aggressively defended the IAAF accusation against Reynolds. On October 4, 1991, after two weeks of deliberation, the TAC hearing panel announced its decision exonerating Reynolds completely:

> The panel, after hearing the matters before it, the testimony of witnesses and expert witnesses of both sides, documents and exhibits, hereby finds that Mr. Harry "Butch" Reynolds has cast substantial doubt on the validity of the drug test attributed to him. The panel finds that the "B" sample positive result . . . has been impeached by clear and convincing evidence.

App. 50a. Having thus successfully exhausted his administrative remedies, Reynolds thought the matter was ended. Unfortunately, it was not.

Embarrassed by the finding that it had made an unsupported accusation against an innocent athlete, and concerned about adverse publicity regarding the pervasive laboratory incompetence which was revealed during the hearing, the IAAF decided to undo the TAC decision. Relying on an infrequently used provision of its own Rules, the IAAF ordered TAC, on November 17, 1991, to submit to an "arbitration" with respect to the TAC hearing panel decision.[2] App. 51a.

The "arbitration" between TAC and the IAAF was finally held six months later. The IAAF maintained Reynolds' suspension in the interim, refusing to proceed more quickly. As the district court found, the "arbitration" was a sham and was not conducted "in good faith." App. 63a.[3] After a mere two hours, and without even itself

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[2] The IAAF rule relied upon provides that the IAAF can compel a member (*e.g.* TAC) to "arbitrate" such a decision when it belives that the member has "misdirected itself." The same rule forbids "arbitration" of a doping dispute between the IAAF and an athlete (*e.g.* Reynolds).

considering the scientific issues, the IAAF "arbitration" panel issued a typed seven-page decision stating that there was "no doubt" as to the laboratory's conclusion. The decision ended by declaring that Reynolds would have to serve out his entire two-year suspension, to August 11, 1992 (two days after the 1992 Barcelona Olympic games ended). It was apparent that the IAAF had no intention of allowing its professed "infallibility" to be challenged.[4]

On May 27, 1992, with the 1992 U.S. Olympic Trials rapidly approaching, Reynolds filed this lawsuit ("*Reynolds II*") seeking both injunctive relief and damages.[5] App. 51a. He also asked for a temporary restraining order to allow him to compete immediately in track and field competitions in order to achieve a qualifying time necessary to participate in the U.S. Olympic Trials scheduled to begin on June 20.

On May 28, 1992, the IAAF advised Reynolds' counsel by letter that it would not participate in *Reynolds II*

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[3] Among other things, the three person "arbitration" panel was appointed by the IAAF, which had published the false accusation in the first instance and which prosecuted its own case before the panel. Moreover, the IAAF withheld critical evidence, refused to consider relevant evidence and generally acted only to protect its own credibility and that of the laboratory. For a description of the many deficiencies in the IAAF "arbitration," see the December 3, 1994 Opinion of the district court. App. 63a-65a.

[4] Before the district court, TAC proclaimed that the IAAF considers itself "infallible" with regard to all decisions it renders. Transcript of Proceedings of the Preliminary Injunction, June 17, 1992 at 207. As IAAF vice-president Arne Ljunqvist had earlier explained:

> Civil courts create a lot of problems for [us], but we have said we don't care in the least what they say. We have our rules and they are supreme.

App. 87a-88a.

[5] The Complaint included four state law causes of action, namely (1) breach of contract, (2) breach of contractual due process, (3) defamation, and (4) tortious interference with business relations.

at all because it did not recognize the jurisdiction of the district court over it in any respect. The district court issued a temporary restraining order which precluded the IAAF, its agents and members from interfering with Reynolds' ability to compete in qualifying track and field competitions.[6] App. 51a-52a.

With full knowledge of the temporary order, the IAAF nevertheless directed TAC to take all steps necessary to prevent Reynolds from competing and ordered TAC to notify all U.S. track and field meet directors that Reynolds was ineligible to compete. TAC so notified meet directors. The IAAF also publicly threatened to suspend and declare ineligible every athlete who competed in any U.S. meet with Reynolds, in spite of the district court's order.[7] Nevertheless, Reynolds did participate in several races and did achieve times sufficient to qualify him to participate in the 1992 U.S. Olympic Trials.

On June 17, 1992, the district court held a preliminary injunction hearing. The IAAF did not appear, but TAC, its agent, intervened to oppose the preliminary injunction. On June 19, 1992, the day before the U.S. Olympic Trials were scheduled to begin, the district court granted Reynolds' request for preliminary injunctive relief. That afternoon, TAC filed a notice of appeal to the Sixth Circuit. In that appeal, TAC raised issues

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[6] On June 8, 1992, that order was extended for an additional ten days.

[7] The IAAF sent two of its officials to the United States for the sole purpose of threatening the meet director of the Bruce Jenner Classic track and field meet in California. The meet director had previously invited Reynolds to compete. The two IAAF officials told the director that, if he allowed Reynolds to compete in that meet, the IAAF would withhold funding for the meet in the future and declare all athletes who competed with Reynolds ineligible for the 1992 Barcelona Olympics. Ollan Cassell, IAAF Vice-President and TAC's Executive Director, also encouraged the meet director to withdraw Reynolds' invitation. Due to the IAAF's threats, the meet director eventually withdrew Reynolds' invitation to compete.

uniquely pertaining to the IAAF, including that of the district court's personal jurisdiction over the IAAF. TAC also asked for an emergency stay of the district court's order. At approximately 7:00 p.m. that evening, stating that the harm to Reynolds was outweighed by the potential harm to other athletes arising from the IAAF's threat to declare ineligible for the Barcelona Olympic Games any athlete who competed with Reynolds, Circuit Judge Eugene Siler granted the emergency stay. *Reynolds v. International Amateur Athletic Fed.*, 968 F.2d 1216 (6th Cir. 1992).

On the morning of June 20, 1992, Reynolds applied to Justice John Paul Stevens for an order vacating the emergency order of Judge Siler. That afternoon Justice Stevens granted Reynolds' request, finding the district court's June 19 Opinion on the merits to be "persuasive" and noting that "The IAAF's threat to enforce its eligibility decision—no matter how arbitrary or erroneous it may be—by punishing innocent third parties cannot be permitted to influence a fair and impartial adjudication of applicant's claims." App. 100a.

Upon receiving notice of Justice Stevens' Order, the IAAF announced that it would nonetheless declare every athlete who competed against Reynolds in the Trials ineligible for the Barcelona Olympic Games. TAC therefore postponed the 400 meter competition and warned all U.S. 400 meter athletes that, if they competed with Reynolds, they would risk suspension by the IAAF and therefore potentially be unable to compete in Barcelona even though the district court's order, reinstated by Justice Stevens, specifically precluded both TAC and the IAAF from taking such action. *Id.* TAC also filed an application to the full Supreme Court to vacate Justice Stevens' stay. The full Court denied TAC's request.[8] *Id.*

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[8] TAC later voluntarily dismissed its appeal of the district court's preliminary injunction.

Reynolds thereafter competed in the Olympic Trials and earned a place on the United States Olympic Team by his effort. The IAAF, however, refused to allow him to participate in the 1992 Summer Olympics in Barcelona. App. 53a. Based upon that refusal, TAC and the USOC removed Reynolds' name from the team roster and refused to take Reynolds to Barcelona with the rest of the Olympic team. On August 10, 1992, the day before Reynolds' original two-year suspension for supposed steroid use was to have expired, the IAAF Council met in Barcelona and unilaterally extended Reynolds' suspension for an additional four months, to December 31, 1992, as a sanction for his seeking relief from the United States courts and for participating in the Olympic trials under the district court's protection. App. 53a-54a. Reynolds remained suspended from all track and field competition through December 31.

On September 28, 1992, Reynolds filed a Supplemental Complaint, outlining the above events and other events that had occurred after the filing of the original Complaint. When no responsive pleading was filed with respect to either the original Complaint or the Supplemental Complaint, Reynolds moved for a default judgment. On October 20, 1992, after full notice to the IAAF and TAC, the district court conducted an extensive evidentiary hearing regarding both the liability of the IAAF and Reynolds' damages. Neither the IAAF nor TAC participated in the October 20 hearing. App. 54a.

On December 3, 1992, the district court issued an opinion concluding that the allegation of steroid use was unsupportable and that the IAAF had "acted with ill will and a spirit of revenge toward Reynolds":

> The evidence before the Court clearly establishes a substantial likelihood that the IAAF's report of Reynolds' drug use was not only false, but that it was disseminated with malice. From the beginning, the IAAF has completely avoided the enormous body of

> scientific and testimonial evidence which establishes substantial doubt as to the reliability of the tests performed on Reynolds' urine sample. Indeed, the record in this case establishes that the IAAF has *purposefully avoided the truth*, if for no other reason than its desire to protect the credibility of its drug testing facilities at the personal expense of Mr. Reynolds.

App. 67a (emphasis in original). Accordingly, the district court entered judgment and awarded both compensatory and punitive damages against the IAAF.[9] In addition, because the IAAF had repeatedly threatened to harm Reynolds by further vindictive acts, the district court entered a permanent injunction precluding the IAAF and TAC from interfering with Reynolds' ability to compete in track and field competitions based upon the false accusation and Reynolds' participation in litigation with the IAAF.

The IAAF did not appeal. Instead, it sent a letter to Reynolds at his home in Columbus, Ohio on January 24, 1993, threatening to take further punitive action against him unless he apologized and suspended all legal action against the IAAF. In addition, IAAF President Primo Nebiolo boasted to the press:

> We are not afraid of Reynolds . . . We will never pay anything, you can be sure. We will never pay anything. We are so tranquil we will never pay anything, I assure you.

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[9] The district court based its $6,839,602 compensatory damage award on record evidence of endorsement contracts (many of which were with Ohio corporations), appearance fees and other income Reynolds lost as a direct result of the IAAF's intentional tortious conduct. It then trebled the compensatory award to arrive at an appropriate punitive damage award consistent with Ohio's policy of "punishing the offending party and setting him up as an example to others that they might be deterred from similar conduct." *Preston v. Murtry*, 32 Ohio St. 3d 334, 335; 512 N.E.2d 1174 (1987).

Ian Thomsen, *Slicing the IAAF Cake: Nebiolo Gets the Big Piece*, Int'l Herald Tribune, June 21, 1993. See also *93 Things That Went Right in '93*, Sports Illustrated, Dec. 27, 1993 ("[n]ever never. He can live 200 years.").

In March 1993, after Reynolds began to execute upon the judgment through garnishment proceedings against various United States corporate sponsors, the IAAF finally appeared in its own name and moved to quash the garnishment proceeding and vacate the default judgment. On July 13, 1993, the district court denied those motions. App. 47a.

On May 17, 1994, the United States Court of Appeals for the Sixth Circuit, purporting to apply this Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984), reversed. In applying *Calder*, the court of appeals accepted the district court's specific findings that as in *Calder*: (1) the "[defendants] intentionally and purposefully directed their tortious acts toward [the resident plaintiff]," (2) "the injury to [the plaintiff] was in the [forum]"; and (3) "the [IAAF] could foresee that its report would be disseminated in [the forum]." App. 18a, 20a. Nonetheless, the Sixth Circuit found *Calder* distinguishable principally because (1) the IAAF, unlike the journalist defendants in *Calder*, was merely the "source" of defamatory statements later published by the press; and (2) the forum state was not the "focal point" of the defamatory statements. Relying on these propositions, the Sixth Circuit held it would not comport with "traditional notions of fair play and substantial justice" for Ohio to assert jurisdiction over the IAAF to answer for the truth of the numerous defamatory statements the IAAF had intentionally issued to the worldwide news media about Reynolds.[10]

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[10] The Sixth Circuit expressly upheld the district court's conclusion that TAC acted as the agent of the IAAF with respect to Reynolds and that the IAAF exerted direct control over TAC. The court, however, never considered the jurisdictional effect of TAC's

REASONS FOR GRANTING THE PETITION

In *Calder v. Jones*, 465 U.S. 783 (1984), a California-based entertainer sued a reporter and an editor of a Florida-based newspaper, claiming she had been libelled by an article the defendants wrote and edited in Florida that was later circulated in California by the defendants' employer. The defendants sought dismissal for lack of jurisdiction on the ground that they had no physical contacts with California. This Court rejected that argument holding that "jurisdiction over [the Florida residents] in California is proper because of their intentional conduct in Florida calculated to cause injury to [the plaintiff] in California." *Id.* at 791. Because the defendants had "expressly aimed" their conduct at a California-based plaintiff, the Court concluded, they must "reasonably anticipate being haled into court there" to answer for the effects of their Florida conduct in California. *Id.* at 790.

Calder reflects this Court's ongoing effort to reconcile the "manifest interest" of the States "in providing [their] residents with a convenient forum for redressing injuries inflicted by out-of-state actors," *Burger King Corp. v.*

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contacts in the forum in determining whether the exercise of specific jurisdiction was warranted. In failing to do so, it ignored the accepted rule of law that, when an entity such as the IAAF acts through its agents in a forum state and the agent is subject to personal jurisdiction in that state, it is appropriate, with respect to the agent's acts and their consequences, to assert jurisdiction over the principal. *See Behagen v. Amateur Basketball Ass'n of the United States*, 744 F.2d 731, 735 (10th Cir. 1984), *cert. denied*, 471 U.S. 1010 (1985) (court held that, given the agency relationship between the Federation Internationale de Basketball Amateur ("FIBA") and its members, it would not offend due process to require FIBA "to defend a lawsuit wherever members conduct FIBA activities if FIBA in fact consists of its members and acts only through them"); *Nehemiah v. The Athletics Congress of the United States, Inc.*, 765 F.2d 42, 48 (3d Cir. 1985) (without deciding the issue on the record before it, the court noted that the agency relationship between TAC and the IAAF may be sufficient to subject the IAAF to specific jurisdiction in a state where TAC is admittedly subject to personal jurisdiction).

Rudzewicz, 471 U.S. 462, 473 (1985), with the Due Process Clause's protection of individuals "against inconvenient litigation." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). Starting from the axiom that "in judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation,'" *Calder*, 465 U.S. at 788 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)), this Court addressed the balance of those interests in the particular context of an intentional tort. The Court held specifically that the defendants' intentional targeting of a California plaintiff defined such relationship and established a level of forum contact "so manifold as to permit jurisdiction when it would not [otherwise] exist . . . ." *Id.* As the Court explained, "[h]ere, the plaintiff is the focus of the activities of the defendants out of which the suit arises." *Id.* (citation omitted).

Calder thus recognized that the States' interest in protecting their citizens is undeniably at its zenith in the context of intentional misconduct. The legitimate interest of the intentional tortfeasor in avoiding "inconvenient" litigation, by contrast, is relatively slight—having purposefully chosen as his victim a resident of a particular State, the intentional tortfeasor cannot be heard to complain too loudly when he is called upon by that State to answer for his intentional misconduct. Thus, given the Due Process Clause's limited aim of protecting defendants from being haled into a forum solely as a result of "random, isolated or fortuitous" contacts with that State, jurisdiction over the intentional tortfeasor is not constitutionally objectionable. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); see *Calder*, 465 U.S. at 789.

Although *Calder* established that an intentional tortfeasor's targeting of a forum resident can satisfy due process requirements, it also identified other contact factors present in that case without clarifying what, if any, constitutional significance attached to them. This Court's subsequent decisions in *Burger King* and *Asahi Metal*

Industries Co. v. Superior Court of California, 480 U.S. 102 (1987), arguably suggest that due process never compels a focus on the defendant's physical contacts with the forum once it is established that the defendant has intentionally targeted a forum resident. See, e.g., *Burger King*, 471 U.S. at 474 ("the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed"). However, to the extent any due process limits are appropriate in this context, a clear statement of the limits of *Calder* is necessary now to define what factors other than intentional tortious conduct directed at a forum resident, if any, are essential to jurisdiction over nonresidents. Otherwise, the due process analysis will take on an increasingly unpredictable and *ad hoc* cast.[11]

No decision of this Court since *Calder* has clarified the scope of the due process inquiry in this regard. As a consequence, the circuit courts, now including the Sixth Circuit, have reached conflicting results concerning its appropriate application. The conflicts principally center around the weight to be given the additional factors recited by this Court in *Calder*.[12]

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[11] One possibility, of course, is to consider whether a particular circumstance renders jurisdiction over a nonresident tortfeasor consistent with "traditional" notions of fair play. *See Burnham v. Superior Court of Cal.*, 495 U.S. 604, 615 (1990) (upholding California's assertion of jurisdiction over a nonresident defendant served in California because "[t]his American jurisdictional practice is, moreover, not merely old; it is continuing. It remains the practice of not only a substantial number of the States, but as far as we are aware *all* the States"). A focus on "traditional" notions of fair play would support jurisdiction over the IAAF here, as its conduct toward Reynolds was essentially that of the classic "sniper" who stands in one state and aims a gunshot at the plaintiff across the border. *See* Restatement (Second) of Conflicts of Law § 37 (1991).

[12] *Calder* has additionally spawned a conflict among the circuits regarding whether the defendant must *initiate* the defamatory communications. In *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d

First, the Sixth Circuit's holding that Ohio cannot constitutionally exercise specific jurisdiction over the IAAF because the IAAF itself did not publish the defamatory statement in Ohio directly conflicts with holdings of the First, Fourth, Eighth and Ninth Circuits. Second, the Sixth Circuit's holding that a State may not exercise jurisdiction over an intentional tortfeasor who purposefully directs defamation at a forum resident from outside the forum unless the forum is the "focal point," not only of the "effect" of the defamation (as the plaintiff's residence clearly is), but also of the events reported in the defamatory statement, directly conflicts with prior holdings of the Fourth, Ninth and Tenth Circuits.

Given the strong interest of the States in providing victims of intentional torts with a forum for redressing their injuries and the clear need for certainty in this area, either conflict among the circuits warrants review by this Court of the decision below. Together, these issues present an ideal opportunity for the Court to provide what a decade of costly and time-consuming litigation in the lower courts has failed to produce: a clear statement of the circumstances in which States are permitted

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201 (1st Cir. 1994), the First Circuit held that jurisdiction will not lie against a nonresident journalist's source where "the source of the allegedly defamatory remark did not *initiate* the pivotal contact." *Id.* at 208 (emphasis added). The Fifth and Eleventh Circuits have placed similar limitations on *Calder* effects-based jurisdiction over intentional tortfeasors. *See Wilson v. Belin*, 20 F.3d 644 (5th Cir. 1994); *Madara v. Hall*, 916 F.2d 1510 (11th Cir. 1990). The Ninth and Tenth Circuits, by contrast, have held that States may assert jurisdiction over nonresident intentional tortfeasors, regardless of who initiated the contact during which the intentional tort occurred. *See Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257 (9th Cir. 1989) (defendant's "communications were directed to [the forum state], even though he did not initiate the contact"); *Burt v. Board of Regents of the Univ. of Neb.*, 757 F.2d 242 (10th Cir. 1985), *vacated on other grounds*, 475 U.S. 1063 (1986). Here, of course, the nonresident defendant, the IAAF, *did* initiate the pivotal contact by issuing numerous press releases to the worldwide media.

under the Constitution to assert jurisdiction over nonresident intentional tortfeasors.

I.

While the Sixth Circuit acknowledged that the IAAF purposefully directed numerous defamatory statements at Reynolds, an Ohio resident, and intended that defamation to receive the widest possible dissemination, it concluded that Ohio could not constitutionally exercise jurisdiction because the IAAF "itself did not publish or circulate the report in Ohio; Ohio periodicals disseminated the report." App. 19a.

In holding that the defendant itself must publish the libel in the forum, the Sixth Circuit placed itself in direct conflict with the holdings of the First and Fourth Circuits in defamation cases, as well as the Eighth and Ninth Circuits in cases involving other intentional torts. In *Hugel v. McNell*, 886 F.2d 1 (1st Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990), on facts indistinguishable from those present here, the First Circuit upheld New Hampshire's assertion of jurisdiction over nonresident defendants who, acting outside of New Hampshire, supplied allegedly defamatory statements to *Washington Post* reporters. The *Post* printed, again outside of New Hampshire, a story containing the statements. That story was picked up by national news services and was eventually published in New Hampshire, injuring the plaintiff, a New Hampshire resident. The First Circuit reasoned that, because the defendants "directed their actions toward the forum state, and knew that the brunt of the devastating blow caused by release of the allegedly libelous material would be felt in the State where [the plaintiff] resided," 886 F.2d at 5, "the intervening actions of the reporters and editors of the *Washington Post* are irrelevant to the question of whether New Hampshire can exert personal jurisdiction over the [defendants]." *Id.*

The Fourth Circuit reached a similar conclusion in *Blue Ridge Bank v. Veribanc, Inc.*, 755 F.2d 371 (4th

Cir. 1985). In that case, a nonresident financial information company sold allegedly defamatory information about a Virginia bank to the Chicago Tribune Syndicate for use by a financial columnist based in New York. The columnist used the information to write a column that appeared in a Virginia newspaper. The Fourth Circuit upheld Virginia's assertion of jurisdiction over the nonresident financial information company because the defendant "obviously knew that [the journalist] was going to write an article that included the allegedly libelous information about [the plaintiff] and that the article could find its way into [the forum jurisdiction]." *Id.* at 374.

Outside the context of defamation, two other circuit courts have also held that the intervening acts of others do not insulate intentional tortfeasors. In *Dakota Industries, Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384 (8th Cir. 1991), for example, the Eighth Circuit upheld South Dakota's assertion of jurisdiction over a nonresident manufacturer alleged to have intentionally infringed the trademark of a South Dakota resident, notwithstanding the fact that the defendant did not directly ship its goods to South Dakota. Citing *Calder*, the court reasoned that "[a]lthough the defendant's lack of control over distribution of the product in the forum state may weigh against jurisdiction in a negligence action, that lack of control will not bar jurisdiction when the plaintiff has alleged an intentional tort." *Id.* at 1390.

Similarly, the Ninth Circuit in *Lake v. Lake*, 817 F.2d 1416 (9th Cir. 1987), upheld Idaho's assertion of jurisdiction over a California attorney who intentionally concealed facts from a California court in order to obtain an *ex parte* order for "the very purpose of" allowing his clients to obtain custody in Idaho of the plaintiff's child. *Id.* at 1423. In rejecting the defendant's argument that his conduct was too remote from the plaintiff's injury to support jurisdiction, the Ninth Circuit held that the rule in *Calder* was satisfied because the defendant "intended

a foreign act, obtaining the California *ex parte* order, to have an effect in the forum state of Idaho." *Id.*

The holdings of the First and Fourth Circuits in defamation cases are perfectly reasonable. When a nonresident defendant intending to harm the plaintiff intentionally places a defamatory statement into the media stream in a manner calculated to achieve the widest possible dissemination, the defendant purposefully avails itself of any forum where harm occurs and especially the forum where an individual plaintiff resides. In effect, as the Eighth and Ninth Circuits have expressly recognized, by targeting the plaintiff with intentional harm, the nonresident defendant "enters" the forum and thus is constitutionally subject to specific personal jurisdiction.[13]

The Sixth Circuit, however, has now reached a contrary conclusion by its opinion in this case. Although it accepted the district court's findings that the IAAF could foresee that its false statements would be disseminated in Ohio and that Reynolds was in fact injured by those publications, it nonetheless held that Ohio could not constitutionally exercise specific jurisdiction over the IAAF because the IAAF itself did not publish the defamatory statement in Ohio.

Its conclusion in that regard is in direct conflict with the other circuits. Among the purposes served by certiorari is the promotion of uniformity with regard to jurisdictional matters and the elimination of fortuity

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[13] *See also Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, Ltd.*, No. 94-2578, 1994 U.S. App. LEXIS 21817 (7th Cir. Aug. 12, 1994) (where defendants intend through nationwide broadcasts to impair the trademark of the plaintiff, the defendants have "entered" the forum and assume the risk of being haled into court in the plaintiff's home state); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir.), *cert. dismissed*, 63 U.S.L.W. 3109 (1994) (in patent infringement action, where defendant intentionally places the infringing product into the stream of commerce, the defendant is amenable to jurisdiction where the infringing activity directly impairs the interests of the patentee).

of residence in determining the meaning of the Constitution. If Reynolds had resided in any state within the First, Fourth, Eighth or Ninth Circuits, instead of the Sixth Circuit, his judgment would not have been vacated for lack of personal jurisdiction. The Court should grant the petition to resolve this conflict.

II.

The Sixth Circuit below gave constitutional weight to its conclusion that Ohio was not the "focal point" of the defamatory statements that the IAAF purposefully directed at Reynolds. App. 19a. ("the press release concerned Reynolds' activities in Monaco, not Ohio . . . . [T]he source of the controversial report was the drug sample taken in Monaco and the laboratory testing in France. . . . Ohio was not the 'focal point' of the press release"). This restriction on the States' exercise of personal jurisdiction over intentional tortfeasors likewise directly conflicts with the approach of the other courts of appeals that have considered the issue.

In *Burt v. Board of Regents of the University of Nebraska*, 757 F.2d 242 (10th Cir. 1985), *vacated on other grounds*, 475 U.S. 1063 (1986), the Tenth Circuit upheld Colorado's assertion of jurisdiction over a Nebraska doctor who made allegedly defamatory statements about the Colorado plaintiff's conduct in Nebraska. A vigorous dissent in *Burt* objected to the majority's holding because the focal point of the libelous story was Nebraska. Adopting precisely the reasoning of the Sixth Circuit in this case, he argued that *Calder* requires the forum to be the focal point of *both* the story and the harm, and concluded "[w]e thus have but half a *Calder*." 757 F.2d at 245. The majority ruled, however, that the "dispositive" language of *Calder* premised jurisdiction on defendants' "intentional conduct in Florida calculated to cause injury to [the plaintiff] in California." *Id.* at 244. Thus, it held that "no due process notions of fairness are violated by requiring one who intentionally libels another to

answer for the truth of his statements in any state where the libel causes harm to the victim." *Id.* at 245.

The Tenth Circuit was clearly correct in rejecting the dissenter's reasoning and, by implication, that of the Sixth Circuit. To insist that a forum be the geographic "focal point" of a defamatory story is completely arbitrary, as there is often no meaningful way to identify a single "focal point" for a story.[14] A story about a failed drug test, like that of alleged alcohol abuse in *Calder*, obviously implicates the place of the purported test; but that location is truly fortuitous and unrelated to the controversy. If any single "focal point" is to be identified, it should most logically be the place where the subject's moral standing is most clearly at stake—the state of his or her residence. Cf. *Crane v. Carr*, 814 F.2d 758, 760 (D.C. Cir. 1987) (Ginsburg, J.) ("libel [claims] are the kind in which the injury, foreseeably, is felt with greatest force in the place where the plaintiff lives").

The Sixth Circuit's holding also directly conflicts with that of the Ninth and Fourth Circuits. In *Brainerd v. Governors of the University of Alberta*, 873 F.2d 1257 (9th Cir. 1989), the Ninth Circuit upheld Arizona's assertion of jurisdiction over a Canadian university official based on his allegedly defamatory statements regarding the plaintiff's conduct at the Canadian university. The court reasoned that even though the content of the defamatory statements concerned events in Canada, the defendant was subject to personal jurisdiction in Arizona because he was "alleged to have committed intentional

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[14] The Sixth Circuit analysis below illustrates the problem: after noting that the defamatory statements "concerned Reynolds' activities in Monaco," and "the source of the controversial report was the drug sample taken in Monaco and the laboratory testing in France," the court did not identify any location as the "focal point" of the defamation. If a plaintiff could only sue in a forum which was "the focal point" of a defamatory communication, it is doubtful that Reynolds (and many other plaintiffs) could seek redress in *any* forum. App. 19a.

torts" and he "knew the injury and harm stemming from his communications would occur in Arizona, where [the plaintiff] planned to live and work." *Id.* at 1259.[15]

The Fourth Circuit likewise allowed a Virginia court to exercise jurisdiction over a national organization headquartered in Illinois, despite finding that "the allegedly libelous letters were not directed only at the plaintiffs' actions in Virginia." *First. Am. First, Inc. v. National Ass'n of Bank Women*, 802 F.2d 1511, 1517 (4th Cir. 1986). The Court held that *Calder* supported Virginia's jurisdiction to hear the intentional tort claims of a Virginia-based plaintiff, because "[t]he allegedly defamatory letters, though written in and mailed from Illinois and distributed throughout the country, were nevertheless directed in their intended effect at the activities in Virginia of Virginia residents." *Id.*

The Sixth Circuit's requirement of a single geographic "focal point" is out of place in a proper due process inquiry. The issues are fairness to both parties, measured in terms of harm to the plaintiff and relative inconvenience to the defendant, and a proper regard for the interests of the forum State. See *Keeton*, 456 U.S. 770, 776 (1984) (state where libel was published has an interest in "discourag[ing] the deception of its citizens"). This analysis is not well served by a rule that would require a State to deny its citizens a forum for redress against in-

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[15] In other cases, courts have indicated confusion about the import of *Calder* by describing its rule of law in one way and applying it in another. For example, in *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1486 (9th Cir. 1993), and *Wallace v. Herron*, 778 F.2d 391, 394 (7th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986), the Ninth and Seventh Circuits described *Calder* as upholding specific jurisdiction when a defendant has allegedly committed an intentional tort outside the forum state and its injurious effects are predictably felt in the forum State. 11 F.3d at 1486; 778 F.2d at 394. In applying *Calder* to the facts before them, however, both courts based their analysis, in part, on *Calder*'s recitation of the actual forum connections present in that case.

tentional injury, if the injury resulted from defamatory statements about events that purportedly occurred elsewhere. At a minimum, the Sixth Circuit's reasoning conflicts with holdings of at least three sister courts of appeals and therefore warrants further review.

III.

Review of these clear constitutional conflicts which arise from the Sixth Circuit's decision is not merely appropriate, but essential. The uncertainty created by the decision below seriously undermines this Court's efforts to craft a reasonable balance between the States' "manifest interest" in protecting their citizens from tortious conduct and nonresident defendants' due process interest in avoiding "inconvenient litigation." The IAAF's contacts with Ohio—specifically, the IAAF's intentional direction of defamatory statements and conduct at an Ohio resident "with malice," App. 67a, which predictably caused devastating tortious injury to Reynolds in Ohio, "cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous." *Keeton*, 465 U.S. at 774. The decision below, however, which rests on factors wholly unrelated to any reasonable notion of "fair play," transforms the Due Process Clause from a limited protection against "inconvenient litigation" grounded in concerns of "fairness" and "reasonableness," *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980), into a nearly complete shield for well-advised nonresident tortfeasors who *intentionally* target forum residents.

Resolving the uncertainty created by the conflicts among the lower courts is no mere academic exercise. It is the view of several States, including Ohio, that they may permissibly exercise jurisdiction over out-of-state actors who commit tortious acts, the effects of which are felt in-state by state residents. "This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by provid-

ing that a tortfeasor shall be liable for damages." Restatement (Second) of Conflict of Laws § 36, cmt. c (1971). But the States' deterrence goal can only be accomplished with certainty of punishment, and the existing jurisdictional uncertainty renders that impossible. Moreover, where, as here, the intentional tort at issue is defamation, the State's interest is further magnified because such misconduct harms not only the target of the defamatory statements but also listeners and readers in the forum. See *Keeton*, 465 U.S. at 776.

As the world economy becomes more integrated, the role of standard-setting organizations at the national and international level necessarily has increased. The risk that such organizations will intentionally inflict harm is significant in light of the historic reliance consumers, understood broadly, have placed in the ability of such organizations to ensure quality and compliance with minimum standards. Under the Sixth Circuit's view, any such organization or association, located outside the United States, can declare from abroad that the conduct of a United States entity or person is improper, provoking the concomitant damages which such a finding entails, and avoid entirely any accountability in the courts of the United States. Indeed, the decision below provides a virtual blue print for international associations, like the IAAF, to obtain the substantial benefits of doing business in the United States while avoiding completely any responsibility for intentional tortious conduct even when specifically directed at U.S. citizens.[16]

In sum, the notion that an organization can control virtually all aspects of the professional life of American citizens through actions taken abroad and agents operating in this country while obtaining huge sums of money

[16] In this case, the IAAF initially took the position that it was subject to suit, if at all, only in England. Since the litigation, the IAAF has removed itself to Monaco for the express purpose of further insulating itself from this and other litigation.

from the rich fields of domestic corporate sponsorships, and yet maliciously destroy one such citizen without having to answer in the forum where that citizen was demonstrably injured, is in direct conflict with holdings of other courts of appeals. The decision below therefore should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 6, 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-3884

HARRY L. REYNOLDS, JR.,
Plaintiff-Appellee,

v.

INTERNATIONAL AMATEUR ATHLETIC FEDERATION,
Defendant-Appellant,

THE ATHLETIC CONGRESS, *et al.*,
Defendants.

On Appeal from the United States District Court
for the Southern District of Ohio

Decided and Filed May 17, 1994

Before: KENNEDY and MILBURN, Circuit Judges; and LIVELY, Senior Circuit Judge.

LIVELY, Senior Circuit Judge. The International Amateur Athletic Federation (IAAF) appeals the district court's denial of its motion to quash garnishment proceedings and vacate a default judgment and permanent injunction previously entered by the district court. As it did before the district court, the IAAF argues on appeal that the district court had neither subject matter jurisdiction

nor personal jurisdiction over the IAAF in the proceedings resulting in the default judgment and permanent injunction.

I.

A.

Harry "Butch" Reynolds is a world-class sprinter who regularly participates in international track and field meets. Reynolds currently holds the individual world record in the 400 meters, is a member of the world record holding 4x400 relay team, and is a gold and silver medalist from the 1988 Olympics.

On August 12, 1990, Reynolds ran in the "Hercules '90" meet in Monte Carlo, Monaco. Immediately after the competition, Reynolds was tested for illegal performance-enhancing drugs as part of a random drug test conducted after all international track meets. Two different samples of Reynolds' urine were sent to Paris for analysis. Each sample contained trace amounts of the steroid Nandrolone, a drug banned by international track regulations created by the IAAF.

The IAAF is an unincorporated association based in London, England, and is made up of track and field organizations representing 205 nations and territories. Its purpose is to coordinate and control track and field athletes and competitions throughout the world. The IAAF has no offices in the United States, and holds no track meets in Ohio, where Reynolds brought this action. One member of the IAAF is The Athletics Congress of the United States, Inc. (TAC), the United States national governing body for track and field.[1]

After Reynolds' positive drug test, the IAAF banned him from all international track events for two years.

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[1] TAC has recently changed its named to U.S.A. Track and Field. However, throughout these proceedings the name "TAC" is used, and we will continue to use it here.

thereby eliminating his hopes for competing in the 1992 Olympics in Barcelona.

The IAAF issued a press release on November 5, 1990, stating that Reynolds was tested following the Monte Carlo meet and that "[t]he Paris laboratory revealed metabolites of the banned substance Nandrolone and a second analysis carried out on the 12th October 1990 confirmed their presence." The release went on to say that Reynolds had been suspended and offered a hearing by TAC, the date of which had not been set. American sports publications and newspapers picked up the release and reported Reynolds' suspension as news items.

B.

Reynolds immediately brought suit in the Southern District of Ohio, arguing that the drug test was given negligently, and provided an erroneous result. The court dismissed one claim and stayed the remainder of the case after finding that Reynolds failed to exhaust administrative remedies provided by the Amateur Sports Act, 36 U.S.C. §§ 371-396 (1988) and TAC. Reynolds appealed the district court's decision. This court agreed with the exhaustion requirement but vacated the judgment and directed that the entire case be dismissed for lack of subject matter jurisdiction. *Reynolds v. TAC*, 935 F.2d 270 (6th Cir. 1991) (Table).

In an attempt to exhaust his administrative remedies, Reynolds participated in an independent arbitration before an AAA panel in June of 1991. Reynolds took this action under the Amateur Sports Act and the United States Olympic Committee Constitution. The AAA arbitrator rendered a decision fully exonerating Reynolds; the arbitrator found strong evidence that the urine samples provided to the Paris laboratory were not Reynolds'. However, the IAAF refused to acknowledge the arbitrator's decision because the arbitration was not conducted under

IAAF rules. Accordingly, the IAAF refused to lift Reynolds' two year suspension.

Reynolds then appealed his suspension to TAC, as required by IAAF rules. TAC held a hearing on September 13, 1991. After thoroughly examining the evidence and deliberating for two weeks, the TAC Doping Control Review Board completely exonerated Reynolds, stating that

> after hearing the matters before it, the testimony of witnesses and expert witnesses of both sides, documents and exhibits, [we] find that Mr. Harry "Butch" Reynolds has cast substantial doubt on the validity of the drug test attributed to him.

Still not satisfied, the IAAF reopened Reynolds' case pursuant to IAAF Rule 20(3)(ii), which allows the IAAF to conduct an independent arbitration where it appears that one of its member foundations such as TAC has "misdirected itself." The IAAF arbitration was held on May 10 and 11, 1992, in London, England (the London Arbitration). The parties to the arbitration proceeding were the IAAF and TAC. Reynolds attended and testified at the hearing, and Reynolds' attorneys participated in the proceedings before the IAAF arbitration board, including examining and cross-examining witnesses. At the conclusion of the hearing, the IAAF arbitral panel found that the drug tests were valid, and that there was "no doubt" as to Reynolds' guilt. As a result, the panel upheld Reynolds' two year suspension.

II.

A.

Soon after the IAAF made its final decision, Reynolds filed the present action in the Southern District of Ohio alleging four different state law causes of action: breach of contract, breach of contractual due process, defama-

tion, and tortious interference with business relations. Reynolds sought monetary damages, and a temporary restraining order that would allow him to compete in races leading to the U.S. Olympic trials on June 20, 1992. The IAAF refused to appear in the case, stating in a letter to Reynolds' attorney that the district court had no jurisdiction over the IAAF. The district court issued a temporary restraining order that prevented the IAAF from interfering with Reynolds' attempt to make the Olympic tryouts. Despite IAAF threats to both Reynolds and TAC, Reynolds ran in a few races and qualified to compete in the U.S. Olympic trials in New Orleans.

On June 17, 1992, the district court held a preliminary injunction hearing to decide if Reynolds should compete in the June 20 Olympic trials. The IAAF refused to appear, but TAC intervened to oppose Reynolds. On June 19, the district court issued a preliminary injunction after finding that it had personal jurisdiction over the IAAF and that Reynolds was likely to succeed on the merits of his claims. That afternoon, TAC filed a motion with the Sixth Circuit Court of Appeals, asking for an emergency stay of the district court's decision. At 7:00 that evening, Judge Siler granted the stay. *Reynolds v. IAAF*, 968 F.2d 1216 (6th Cir. 1992) (Table). The next morning, Reynolds filed an emergency motion with Supreme Court Justice John Paul Stevens, asking for an order vacating Judge Siler's emergency stay. Justice Stevens granted Reynolds' request, finding that the District Court's opinion was "persuasive." *Reynolds v. IAAF*, 112 S.Ct. 2512 (1992).

Despite these rulings, the IAAF announced that every athlete who competed with Reynolds at the U.S. Olympic trials would be ineligible to compete in the Barcelona Olympics. Reynolds' events were temporarily postponed while TAC filed an application to the full Supreme Court to vacate Justice Stevens' stay. The Court denied TAC's request, and Reynolds was eventually allowed to compete

in the Olympic trials, after an agreement was reached between the U.S. Olympic Committee and the IAAF. Reynolds made the Olympic team as an alternate for the 400 meter relay. However, the IAAF refused to let Reynolds compete at the 1992 Olympics, and TAC removed him from the U.S. Olympic team roster. Moreover, the IAAF increased Reynolds' two year suspension by four months as punishment for participating in the U.S. Olympic trials.

B.

On September 28, 1992, Reynolds filed a supplemental complaint with the district court, outlining the above events. The IAAF did not respond to Reynolds' complaint and TAC did not appear in the default proceedings. After the IAAF was given full notice, the court entered a default judgment in Reynolds' favor. Soon afterward, the district court held a hearing to determine damages. Again, the IAAF was provided notice but refused to appear. On December 3, 1992, the district court issued an opinion awarding Reynolds $27,356,008, including treble punitive damages. The district court found that the IAAF "acted with ill will and a spirit of revenge towards Mr. Reynolds." Particular acts by the IAAF cited by the district court included "the suppression of evidence, threats levied against Reynolds and his fellow athletes, and the extension of Reynolds' suspension for an additional four months." More than $20,000,000 of the award was punitive damages of these acts.

The district court found that it had diversity jurisdiction in this case because Reynolds is a citizen of Ohio and the IAAF is a foreign association. The IAAF is an unincorporated association, and the district court reasoned that the IAAF is deemed to be a citizen of all states where its members are domiciled. *United Steelworkers of America v. R. H. Bouligny, Inc.*, 382 U.S. 145, 149-53. The court held that diversity jurisdiction was proper because no IAAF members are citizens of Ohio.

The district court also found that it had personal jurisdiction over the IAAF. The court held that the Ohio long-arm statute was satisfied because the IAAF transacted business with Reynolds in Ohio, and the IAAF's public announcement of Reynolds' positive drug test adversely affected Reynolds in Ohio. The court held that the IAAF had the required minimum contacts with Ohio after finding that TAC acted as the IAAF's agent in the United States. *Behagen v. Amateur Basketball Ass'n*, 744 F.2d 731 (10th Cir. 1984), *cert. denied*, 471 U.S. 1010 (1985) (A question of fact whether American member of international amateur basketball association is the agent of the international association).

C.

On February 17, 1993, Reynolds began garnishment proceedings against four corporations with connections to the IAAF. The IAAF finally appeared at a garnishment hearing before the district court, and later filed a "Motion to Quash Garnishment Proceedings and To Vacate the Default Judgment" pursuant to FED. R. CIV. P. 60(b)(4). In its motion, the IAAF contended that the court lacked personal and subject matter jurisdiction. Before the motion was decided, the IAAF filed a recusal motion, arguing that previous opinions by the court put the district judge's impartiality into question.

The district court denied all motions on July 13, 1993. The court found that it had jurisdiction to overturn the IAAF's arbitration decision despite the United States' participation in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention). See 9 U.S.C. § 201, *et seq.* The text of the Convention appears following 9 U.S.C.A. § 201 (West 1993). The Convention provides that recognition and enforcement of an award may be refused if it "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Convention, Article V 1(e). The district

court found that the Convention only applies where an agreement to arbitrate is in writing and signed by both parties—preconditions not present in the instant case.

The IAAF appeals from denial of its motions. Because it contends that the district court lacked jurisdiction in the earlier proceedings, the IAAF seeks to reverse the money judgment and injunction as well.

III.

Because we have concluded that the district court lacked personal jurisdiction over the IAAF, the sole defendant in this case, it is not necessary to consider the other issues presented and argued by the parties.

A.

The district court found that it had personal jurisdiction over the IAAF under Ohio's long-arm statute. Under this statute a nonresident may be sued in an Ohio court on a cause of action arising from the nonresident's:

> (1) Transacting any business in this state
>
> * * *
>
> (3) Causing tortious injury by an act or omission in this state;
>
> (4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct . . . in this state
>
> * * *
>
> (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state.
>
> . . .

Ohio Revised Code (O.R.C.) § 2307.382. The district court found the IAAF amenable to suit under subsection (1) on Reynolds' contract claims and under subsections (3) and (6) on his claims of defamation and tortious interference with business relations.

Without elaboration, the district court held that a contract existed between Reynolds and the IAAF, which the IAAF breached. This was the basis for personal jurisdiction under subsection (1), "transacting business" in Ohio. The court referred to correspondence between the IAAF's counsel and Reynolds' counsel and the appearance of a professor Donike who testified at the Doping Control Review Board hearing in Ohio that the tests upon which the suspension was based were valid. The district court also found that TAC was the IAAF's agent and that officers of TAC had repeatedly transacted business in Ohio.

With respect to the tort claims, the district court held that although the IAAF had issued the press release in Europe, it should reasonably have expected it to be disseminated in Ohio and should have anticipated that it would injure Reynolds in the state of his residence. Thus, according to the court, the IAAF should reasonably have expected to be "haled into court" in Ohio.

The district court recognized that, regardless of other considerations, a court's exercise of jurisdiction over a nonresident must satisfy due process. The district court found that the IAAF had "minimum contacts" with Ohio both through its own acts and those of its "agent" TAC. Referring to rules developed by this court in dealing with the due process issue in cases against nonresident defendants, the court held that the IAAF "purposefully directed" defamatory statements to Reynolds, knowing that he was a resident of Ohio and would suffer injury there. The court further held that Reynolds' cause of action arose in Ohio, reasoning that the breach of contract and financial consequenecs to Reynolds (loss of endorsements and appearance payments) were brought about solely by the

IAAF's "transaction of business with Plaintiff in Ohio." Thus, according to the court, the IAAF "purposefully availed" itself of Ohio privileges by subjecting Ohio athletes to its rules and by gaining substantial financial rewards from the performances of these athletes.

The district court also held that the IAAF failed to make a timely objection to personal jurisdiction, thereby waiving the defense. Under F.R.C.P. 12(h), a party waives the right to contest personal jurisdiction by failing to raise the issue when making a responsive pleading or a general appearance.

B.

When determining whether there is personal jurisdiction over a defendant, a federal court must apply the law of the state in which it sits, subject to constitutional limitations. *Welsh v. Gibbs*, 631 F.2d 436, 439 (6th Cir. 1980). A court, therefore, must satisfy a two-pronged test: the defendant must be amenable to suit under the forum state's long-arm statute and the due process requirements of the Constitution must be met. *In-Flight Devices Corp. v. Van Dusan Air, Inc.*, 466 F.2d 220, 224 (6th Cir. 1972). As stated, the district court found that the IAAF was amenable to suit in Ohio under both the "transacting business" and "tortious injury" clauses of the Ohio long-arm statute.

1. *Transacting Business*

The question of whether the IAAF submitted to personal jurisdiction through its alleged Ohio business transactions requires us to examine those transactions in light of due process principles because "it is a settled proposition of Ohio law that . . . the [transacting business clause] was intended to extend to the constitutional limits of due process. . . ." *Creech v. Roberts*, 908 F.2d 75, 79 (6th Cir. 1990).

Under the Constitution, personal jurisdiction over a defendant arises from "certain minimum contacts with [the

forum] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted). Depending on the type of minimum contacts in a case, personal jurisdiction can be either general or specific. *Third Nat'l Bank v. Wedge Group Incorporated*, 882 F.2d 1087, 1089 (6th Cir. 1989). Reynolds relies on specific jurisdiction because he claims that jurisdiction arose out of the IAAF's alleged wrongful acts in Ohio. *Id.* at 1089.

The Sixth Circuit has established a three-part test for determining whether specific jurisdiction may be exercised:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable.

In-Flight Devices, 466 F.2d at 226; *LAK, Inc. v. Deer Creek Enterprises*, 885 F.2d 1293, 1299 (6th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990).

(a)

Jurisdiction is proper under the purposeful availment requirement where "the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King Co. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Additionally, the defendant's conduct and connection with the forum must be of a character that he or she "should reasonably anticipate being haled into court there." *Id.* at 474. (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1989)). The district court found that the IAAF had created a "substantial connection" with Ohio

through its "contract" with Reynolds and because of letters, calls and other incidental contacts made by the IAAF in Ohio.

The calls and letters from the IAAF consisted of a response to Reynolds' request for information and a letter sent to Reynolds stating that the IAAF did not accept the district court's jurisdiction. Also, Ollan Cassell, a TAC official who is a Vice-President of the IAAF, traveled to Ohio and repeatedly communicated with Reynolds regarding his suspension; and Professor Manfred Donike, a member of the IAAF Medical and Doping Commission, also appeared at a TAC Doping Control Review Board hearing against Reynolds in Ohio. Finally, Mark Gay, the IAAF's counsel, contacted Reynolds with regard to an IAAF hearing in May 1992. All of these contacts occurred after the issuance of the alleged defamatory statement and imposition of the suspension.

The district court gave no details of the "contract" between Reynolds and the IAAF other than the fact that all athletes who compete in international events are subject to IAAF rules, and the IAAF advances travel and expense money to those athletes. The record contains no evidence of any such advances to Reynolds, however.

(b)

Even if the IAAF purposefully availed itself of Ohio priveleges, the claims against the IAAF must arise out of the IAAF's activities in Ohio. The controversial urine sample was taken in Monaco, analyzed in France, and confirmed by an arbitration hearing in England. The district court found that the IAAF breached Reynolds' contract in Ohio, without conducting the analysis of this contractual relationship as required by *Burger King*.

(c)

Finally, the exercise of personal jurisdiction must comport with "traditional notions of fair play and substantial justice." *Asahi Metal Industry Co. v. Superior Court,*

480 U.S. 102, 113 (1987). In exceptional circumstances, this consideration may serve to establish the reasonableness of jurisdiction with a lesser showing of minimum contacts. *Burger King*, 471 U.S. at 477. A court should consider

> the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies.'

Asahi Metal, 480 U.S. at 113 (citing *World-Wide Volkswagen*, 444 U.S. at 292).

The IAAF contends that holding it amenable to suit in an Ohio court would offend principles of international comity and put international cooperation at risk. Under this theory, the IAAF should not be required to bear the expense of litigating cases around the world when its only contact with a forum is an athlete's residence. Instead, the IAAF argues that only the courts of England, where it is located, have jurisdiction to review its arbitral proceedings. Reynolds counters that his interest in a convenient forum substantially outweighs the inconvenience to the IAAF. Over half of the IAAF's four year $174.5 million budget is received from United States corporations, one of the IAAF's officers resides in the U.S., and its other officers regularly visit the U.S.

2. *Tortious Injury*

Reynolds claimed that the false IAAF drug report was both defamatory and interfered with his contractual relationships. He contends that he lost three Ohio corporate endorsement contracts worth over $2,500,000, and appearance fees in Ohio worth over $1,500,000. For the IAAF to be amendable to suit in Ohio, the IAAF's tor-

tious acts must satisfy both the Ohio long-arm statute and the three constitutional requirements discussed above.

The district court found the Ohio long-arm statute satisfied by the IAAF's tortious acts in Europe. Reynolds claims to have lost over $4,000,000 in Ohio because of the IAAF's allegedly false press release. Also, the district court specifically found that the injury to Reynolds was in Ohio, finding that "[t]he IAAF intentionally and purposefully directed their tortious acts toward Plaintiff, and such acts had a devastating effect upon Plaintiff."

The district court also held that the alleged defamatory statement that the IAAF made in England created minimum contacts in Ohio. Reynolds argues that his claims arose out of the IAAF's contacts with Ohio because the IAAF intentionally defamed him and interfered with his Ohio business relationships. Under this theory, the IAAF knew that the worldwide media would carry the report and that the brunt of the injury would occur in Ohio. See *Hugel v. McNell*, 886 F.2d 1, 5 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 1808 (1990) (information given to *Washington Post* with intent to disseminate nationwide creates personal jurisdiction in New Hampshire, where the plaintiff lived and had an established reputation).

IV.

This court reviews issues of personal jurisdiction de novo. *Conti v. Pneumatic Products Corp.*, 977 F.2d 978, 985 (6th Cir. 1992). Nevertheless, this appeal is from denial of the IAAF's Rule 60(b) motion to set aside a default judgment. We review the denial of that motion under the abuse of discretion standard. *Amernational Industries, Inc. v. Action-Tungsram, Inc.*, 925 F.2d 970, 973 (6th Cir.), *cert. denied*, 111 S.Ct. 2857 (1991).

A.

The district court held that TAC was the agent of the IAAF and that TAC had sufficient minimum contacts

with Ohio to bring the IAAF under the "transacting business" provisions of the Ohio long-arm statute. The IAAF insists that TAC, though a member of the IAAF, is an autonomous body that acts for itself within the United States. The record is to the contrary. TAC represents the IAAF in dealings with American athletes who participate in international events. Its bylaws state that "[t]he purposes of this Congress are to act as the national governing body for athletes in the United States, and to act as the IAAF member in the United States." TAC's president, Frank Greenberg, testified that TAC is "the exclusive representative of [the IAAF] in this country," and that "part of that obligation, part of being the named representative is that [TAC] must follow [IAAF] rules."

Furthermore, the facts in this case demonstrate the IAAF's control over TAC. After receiving the results of the two urine tests and after suspending Reynolds, the IAAF did not notify Reynolds. Instead it told TAC to notify Reynolds and look into the matter, even though the meet involved was sponsored by the IAAF. Reynolds requested documents directly from the IAAF, but the IAAF told Reynolds that all document requests must be made through TAC. As a result, all IAAF documents that Reynolds received came through TAC. Moreover, after the Supreme Court held that Reynolds could compete in the U.S. Olympic Trials, the IAAF told TAC to "take all necessary steps to ensure that Mr. Reynolds does not so compete." While it is true that TAC supported Reynolds at the London Arbitration, it was not there on his behalf, but as a member of the IAAF that was responding under the IAAF's rules. Thus, we agree with the district court that TAC is an agent of the IAAF.

Nevertheless, unless TAC had minimum contacts with Ohio in relation to the "contract" between the IAAF and Reynolds, the court erred in premising jurisdiction of TAC's agency.

B.

The Supreme Court has spoken with respect to the significance of a contractual relationship between an in-state plaintiff and an out-of-state defendant. The Court has held that a contract with an out-of-state party, standing alone, is not sufficient to establish minimum contacts. *Burger King*, 471 U.S. at 478. Instead, to determine whether a party purposefully availed itself of a forum a court must evaluate "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing. . . ." *Id.* at 479. In the instant case, there were no negotiations between Reynolds and the IAAF prior to "execution" of the contract. The IAAF arguably had a minimum course of dealing with Reynolds in Ohio, providing money to Reynolds in Ohio to travel to track events. However, there is no real evidence that a contract was negotiated in Ohio, created in Ohio, performed in Ohio, or breached in Ohio. *See Lak, Inc. v. Deer Creek Enterprises*, 885 F.2d 1293, 1300 (6th Cir. 1989) (place where contractual obligation is incurred is important factor for determining personal jurisdiction), *cert. denied*, 494 U.S. 1056 (1990).

Without further evidence concerning the purported contract, we are unable to agree that the district court had personal jurisdiction over the IAAF on the contract claims, either based on its own activities or those of TAC.

Moreover, the IAAF could not reasonably anticipate being sued in Ohio because of its alleged business dealings with Reynolds. It did not regularly transact or solicit business in Ohio or engage "in any other persistent course of conduct" there. O.R.C. § 2307.382(A)(4). The IAAF cannot foresee being required to defend in every forum where one of its athletes is present. Reynolds' Ohio residence is merely fortuitous and "unilateral activity of [the plaintiff] is not an appropriate consideration

when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). Instead, minimum contacts can only be formed by "an action of the defendant purposefully directed toward the forum State." *Asahi Metal Industry*, 480 U.S. at 112.

The IAAF's contact with Ohio through letters and phone calls was also insufficient to support jurisdiction. Reynolds asked the IAAF for information, but such unilateral action by a plaintiff does not render the defendant amenable to suit in the plaintiff's home forum. *Lak*, 885 F.2d at 1301; *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169 (6th Cir. 1988). Moreover, "[t]he use of interstate facilities such as the telephone and mail is a 'secondary or ancillary' factor and 'cannot alone provide the minimum contacts required by due process.'" *Id.* (quoting *Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309, 314 (8th Cir. 1982)) (interior quotation marks omitted). Although various IAAF officials sent correspondence or made telephone calls to Ohio, these communications are insufficient to establish purposeful availment. See, *e.g.*, *Market/Media Research v. Union Tribune Pub.*, 951 F.2d 102, 105 (6th Cir. 1991), *cert. denied*, 113 S.Ct. 70 (1992) (telephone calls and mail sent to Ohio insufficient for personal jurisdiction); *Capital Dredge & Dock Corp. v. Midwest Dredging Co.*, 573 F.2d 377, 380 (6th Cir. 1978) (same). It is the "quality" of such contacts, "not their number or their status as pre- or post-agreement communications" that determines whether they constitute purposeful availment. *Lak*, 885 F.2d at 1301 (quoting *Stuart v. Spademan*, 772 F.2d 1185, 1194 (5th Cir. 1985)). That quality is missing here.

In short, the IAAF is based in England, owns no property and transacts no business in Ohio, and does not supervise U.S. athletes in Ohio or elsewhere. Its contacts

with Reynolds in Ohio are superficial, and are insufficient to create the requisite minimum contacts for personal jurisdiction.

Even if the IAAF purposefully availed itself of Ohio privileges, the claims against the IAAF must arise out of the IAAF's activities in Ohio. In general, "[a]n action will be deemed not to have arisen from the defendant's contacts with the forum state only when they are unrelated to the operative facts of the controversy." *Creech v. Roberts,* 908 F.2d 75, 80 (6th Cir. 1990). The controversial urine sample was taken in Monaco, analyzed in France, and confirmed by an arbitration hearing in England. The district court found that the IAAF breached Reynolds' contract in Ohio, but there is no evidence of a contract made, performed, or breached in Ohio. Accordingly, Reynolds' contract claim did not arise out of the IAAF's contacts with Ohio. All of the activities relied upon by the district court as taking place in Ohio occurred after the activities in Europe upon which Reynolds bases his contract claims. These activities do not constitute a basis for finding personal jurisdiction under subsection (1) for "transacting business" in Ohio.

V.

The district court found that the IAAF was subject to personal jurisdiction under the provision of the Ohio long-arm statute which provides that a party is amenable to suit by "causing tortious injury in this state . . . by an act outside this state." O.R.C. § 2307.382(A)(6). A tort action can be brought in the location where the injury is suffered. *Lachman v. Bank of Louisiana,* 510 F. Supp. 753 (N.D. Ohio 1981). Reynolds claimed a loss of more than $4,000,000 in Ohio because of the IAAF's false press release and the district court specifically found that the injury to Reynolds was in Ohio, holding "[t]he IAAF intentionally and purposefully directed their tortious acts toward Plaintiff, and such acts had a devastat-

ing effect upon Plaintiff." More needs to be demonstrated, however. The question remains whether the IAAF, in making the alleged defamatory statement in England, had minimum contacts with Ohio.

The leading case on this issue is *Calder v. Jones,* 465 U.S. 783 (1984). In *Calder,* a professional entertainer sued the writers and editors of a Florida magazine for libel in a California court. In concluding that the California court had personal jurisdiction, the Supreme Court reasoned that

> [t]he allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm . . . was suffered in California. In sum, California is the focal point both of the story and the harm suffered.

Id. at 788-89. Because the defendants' intentional actions were aimed at California and the brunt of the harm was felt there, the Court concluded that the defendants could reasonably anticipate being haled into court in California. *Id.* at 789.

We find *Calder* distinguishable for several reasons. First, the press release concerned Reynolds' activities in Monaco, not Ohio. Second, the source of the controversial report was the drug sample taken in Monaco and the laboratory testing in France. Third, Reynolds is an international athlete whose professional reputation is not centered in Ohio. Fourth, the defendant itself did not publish or circulate the report in Ohio; Ohio periodicals disseminated the report. Fifth, Ohio was not the "focal point" of the press release. The fact that the IAAF could foresee that the report would be circulated and have an effect in Ohio is not, in itself, enough to create personal jurisdiction. *World-Wide Volkswagen Corp.,* 444 U.S. at

295. Finally, although Reynolds lost Ohio corporate endorsement contracts and appearance fees in Ohio, there is no evidence that the IAAF knew of the contracts or of their Ohio origin. *Calder* is a much more compelling case for finding personal jurisdiction.

Reynolds argues, however, that his claims arose out of the IAAF's connection with Ohio because the IAAF intentionally defamed him and interfered with his Ohio business relationships. Under this theory, the IAAF knew that the worldwide media would carry the report and that the brunt of the injury would occur in Ohio.

Even accepting that the IAAF could foresee that its report would be disseminated in Ohio, however, the IAAF would not be subject to personal jurisdiction in Ohio. *Madara v. Hall,* 916 F.2d 1510, 1519 (11th Cir. 1990) (defendant's knowledge that independent publisher might publish defamatory statements in California does not create personal jurisdiction). The press release that the IAAF issued in London did not directly accuse Reynolds of using forbidden substances. It recited the fact that the Paris laboratory had reported a positive drug test and that Reynolds had been suspended and offered a hearing. We cannot hold that this act of the IAAF satisfied the requirements of the Ohio statute, or that permitting the IAAF to be sued in Ohio for the press release would comport with due process.

VI.

Relying on F.R.C.P. § 12(h)(1) (waiver of defenses), the district court found that the IAAF waived its right to contest personal jurisdiction. See *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 703 (1982) (failure of timely objection to personal jurisdiction can result in waiver of objection). We do not agree. Under F.R.C.P. 12(h), a party waives the right to contest personal jurisdiction by failing to raise the issue when making a responsive pleading or a general

appearance. See, *e.g., In Re Wolverine Radio Co.,* 930 F.2d 1132, 1137 n.5 (6th Cir. 1991). However, courts have generally held that "[d]efects in personal jurisdiction . . . are not waived by default when a party fails to appear or to respond." *Williams v. Life Saving and Loan,* 802 F.2d 1200, 1202 (10th Cir. 1986). See also *Hugel v. McNell,* 886 F.2d 1, 3 n.3 (1st Cir. 1989) ("[defendants] made no appearance prior to final judgment and thus never waived the defense of lack of personal jurisdiction"); *Pacific Atlantic Trading Co. v. M/V Main Exp.,* 758 F.2d 1325, 1331 (9th Cir. 1985) (default judgment entered without personal jurisdiction is void). The IAAF did not file a responsive pleading or enter a general appearance. Accordingly, the district court incorrectly decided that the IAAF waived its personal jurisdiction defense by failing to appear until after the default judgment was entered.

The district court also held that the IAAF waived its objection to personal jurisdiction by reason of TAC's intervention in this action. After Reynolds lost in the London arbitration proceeding, he filed a motion for preliminary injunction to let him race in the United States Olympic Trials. The IAAF did not respond and did not appear at the injunction hearing, but TAC intervened as a defendant.

The key to determining whether the IAAF waived its personal jurisdiction defense through TAC's intervention is whether the IAAF authorized TAC to appear in its place. *Federal Deposit Ins. Corp. v. Oaklawn Apts.,* 959 F.2d 170, 175 (10th Cir. 1992). In its request to intervene, TAC argued that it was required to uphold IAAF regulations, and contended that

> TAC, a member of the IAAF . . . is bound by the decision declaring plaintiff ineligible; and thus under the Amateur Sports Act, TAC may not permit him to participate in the Olympic Trials.

TAC was carrying out its statutory duty under the Amateur Sports Act and was not acting as the IAAF's agent

when it intervened. There is no indication that the IAAF authorized or even requested TAC to appear. Indeed, the IAAF had consistently refused to appear and had taken the position that the district court lacked jurisdiction over the entire proceeding. We conclude that TAC appeared solely in its role as the national governing body under the Amateur Sports Act.

CONCLUSION

In conclusion, we do not believe that holding the IAAF amenable to suit in an Ohio court under the facts of this case comports with "traditional notions of fair play and substantial justice." *Asahi Metal Industry*, 480 U.S. at 113. The IAAF stated in its brief and at oral argument that it will not challenge the jurisdiction of English courts to determine the validity of the London Arbitration award if Reynolds seeks to have it set aside in the courts of that country.

Our decision renders the IAAF's recusal motion moot.

The district court abused its discretion by denying the IAAF's Rule 60(b)(4) motion for relief. The judgment of the district court is REVERSED. Upon REMAND the district court will dismiss this action for lack of personal jurisdiction over the IAAF.

APPENDIX B

[Filed Jul. 7, 1994]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 93-3884

HARRY L. REYNOLDS, JR.,
Plaintiff-Appellee,
v.
INTERNATIONAL AMATEUR ATHLETIC FEDERATION,
Defendant-Appellant,
THE ATHLETIC CONGRESS, *et al.*,
Defendants.

ORDER

BEFORE: KENNEDY and MILBURN, Circuit Judges; and LIVELY, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX C

[Filed Jul. 13, 1993]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-92-452

HARRY L. REYNOLDS, JR.,
Plaintiff,

v.

INTERNATIONAL AMATEUR ATHLETIC FEDERATION,
Defendant.

OPINION AND ORDER

This matter comes before the Court to consider the motion of the Defendant, International Amateur Athletic Federation ("IAAF"), to vacate the default judgment previously entered by this Court on December 3, 1992. Fed. R. Civ. P. 60(b). The motion filed subsequent to garnishment proceedings initiated in this case by Plaintiff Reyolds, contends that this Court lacked both personal jurisdiction over the IAAF and subject matter jurisdiction over the controversy.

STANDARD OF REVIEW

The mechanism by which an entry of default judgment may be set aside is found in Federal Rule of Civil Procedure 55(c):

> For good cause shown the court may set aside an entry of default and, if a judgment by default has

> been entered, may likewise set it aside in accordance with Rule 60(b).

Thus, a default *entry* can be set aside under this rule for "good cause shown," while a default that has become final as a *judgment* can be set aside only under the stricter Rule 60(b) standards for setting aside final, appealable orders. Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

While relief from judgment under Rule 60(b) is normally an extraordinary remedy to be granted only in exceptional circumstances, where the motion is brought under Rule 60(b)(4) and alleges that "the underlying judgment is void because the court lacked personal or subject matter jurisdiction," once the court decides that the allegations are correct "the trial judge has no discretion and must grant appropriate Rule 60(b) relief." *Textile Banking Co. v. Rentschler*, 657 F.2d 844, 850 (7th Cir. 1981). While there is some dispute in the federal courts as to which party carries the burden of proof with respect to jurisdiction after a default judgment has been entered, this Court believes the Seventh Circuit's approach is the better one:

If the defendant, after receiving notice,

> chooses to let the case go to a default judgment, the defendant must then shoulder the burden of proof when the defendant decides to contest jurisdiction in a postjudgment rule 60(b)(4) motion.

Bally Export Corp. v. Balicar, Ltd., 804 F.2d 398, 401 (7th Cir. 1986). *See also Rohm & Haas Co. v. Aries*, 103 F.R.D. 541, 544 (S.D.N.Y. 1984) (noting that the opposing view fails to consider that a defendant has an opportunity prior to the entry of default to oppose jurisdiction by a Rule 12 motion).[1]

DISCUSSION

I. Subject Matter Jurisdiction

A. Diversity Jurisdiction

The Court must first consider whether subject matter jurisdiction exists. Plaintiff asserts that diversity jurisdiction exists pursuant to 28 U.S.C. § 1332(a), which provides:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, . . . and is between —
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;[2]

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[1] This Court firmly believes that there ought to be some incentive for a defendant to contest jurisdiction with a Rule 12(b) motion rather than to await judgment and contest jurisdiction with a Rule 60(b) motion. After all, the resources conserved may often times be enormous. By shifting the burden of proof, a defendant receives just such an incentive.

[2] Jurisdiction asserted pursuant to section 1332(a)(2) is commonly referred to as alienage jurisdiction.

> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties;
>
> (4) a foreign state, . . . as plaintiff and citizens of a State or of different States.

Plaintiff claims to be a citizen of Ohio, and this claim is not seriously contested.[3] Accordingly, the Court must determine whether the IAAF is diverse from Plaintiff within the meaning of § 1332(a).

The IAAF is an unincorporated association. For purposes of § 1332(a), an unincorporated association is deemed to be a citizen of all states in which members are domiciled. Thus, the citizenship of each IAAF member [4] must be considered in determining whether diversity exists. *See* Charles A. Wright, et al., *Federal Practice and Procedure* § 3630, at 688-89. Plaintiff maintains that diversity jurisdiction exists because no IAAF member is a citizen of Ohio. Thus, the IAAF's citizenship is completely diverse from Plaintiff's citizenship. Defendant, however, maintains that diversity jurisdiction does not exist. Specifically, Defendant asserts that some of its two hundred members are not "citizens or subjects of foreign states" within the meaning of § 1332(a) because certain IAAF members either are agencies or instrumentalities of

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[3] The complaint states that Plaintiff resides in Westerville, Ohio. Because diversity jurisdiction looks only to an individual's citizenship, Defendant asserts that the complaint should have stated that Plaintiff is a citizen of or is domiciled in Ohio. Notwithstanding, the record before the Court establishes Plaintiff's Ohio citizenship. *See Fawvor v. Texaco, Inc.*, 387 F. Supp. 626, 628 (E.D. Tex. 1975), *remanded on other grounds*, 546 F.2d 636 (5th Cir. 1977).

[4] The membership of the IAAF consists of approximately 205 national amateur athletics associations. Each member represents a separate country. The Athletic Congress ("TAC") is an IAAF member which represents the United States. For the purposes of diversity jurisdiction, TAC is a citizen of Indiana and Virginia.

foreign states, or are citizens or subjects of states not recognized by the United States. Defendant also asserts that diversity jurisdiction cannot exist because one of its members has no citizenship. The Court shall consider each assertion in turn.

1. Agents or Instrumentalities of Foreign Sovereigns

It is well established that an action involving an agency or instrumentality of a foreign sovereign may be prosecuted only if the procedural requirements of the Foreign Sovereign Immunities Act ("FSIA") are met. 28 U.S.C. §§ 1330, 1602-11. Moreover, the FSIA provides the sole basis for obtaining subject matter jurisdiction over such agency or instrumentality. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

As Defendant has acknowledged, however, Plaintiff is not suing each IAAF member individually. Rather, Plaintiff is suing the IAAF as an entity. Therefore, because suit was not brought against a foreign agent or instrumentality, Plaintiff need not comply with the procedural requirements of the FSIA. Further, there is nothing in the language of the FSIA which prevents a court from concluding that an agent or instrumentality of a foreign state is a subject or citizen of a foreign state for the purposes of determining the citizenship of an unincorporated association. Consequently, the fact that some members may be agents or instrumentalities of a foreign state does not preclude the Court from asserting diversity jurisdiction over the IAAF.

2. Citizens or Subjects of States Not Recognized by the United States

Not every alien can sue under diversity jurisdiction. The party must be a citizen or subject of a "foreign state." Unrecognized regimes are usually not considered "foreign states" under 28 U.S.C. § 1332(a), and, as a result, their nationals are not citizens or subjects of a foreign state

entitled to sue under the same statute. Therefore, as a general rule [5], a foreign national can sue in federal court only if he is a citizen of a foreign state which is recognized by the United States government at the time of the commencement of the suit. *Land Oberoesterreich v. Gude*, 109 F.2d 635, 637 (2d Cir. 1940). This rule is not limited to cases involving diversity jurisdiction, however. It precludes an unrecognized nation from bringing suit regardless of the basis for asserting subject matter jurisdiction. *See, e.g., Republic of Vietnam v. Pfizer, Inc.*, 556 F.2d 892 (8th Cir. 1977) (federal question jurisdiction).

Notwithstanding, recognition by the Executive Branch is not required where the unrecognized nation or national is brought into the suit as a *defendant*. In *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 48 (2d Cir. 1991), the Second Circuit stated:

> While unrecognized regimes are generally precluded from appearing as plaintiffs in an official capacity without the Executive Branch's consent, [citations omitted], there is no bar to suit where an unrecognized regime is brought into court as a defendant.

The *Klinghoffer* court found that the Palestine Liberation Organization ("PLO")—although never recognized by the Executive Branch—did not "lack[] the capacity to be sued in United States courts." *Id.* Hence, although certain IAAF members may represent states not recognized by the Executive Branch, this fact, in and of itself, does not prevent this Court from asserting diversity jurisdiction over Plaintiff's suit.

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[5] The rationale for this rule is as follows: The constitutional authority to recognize nations lies solely with the Executive Branch. *Banco National de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964). Thus the judiciary should not undermine the foreign policy of the Executive Branch by entertaining suits from unrecognized nations or their nationals. *See Latvian State Cargo & Passenger S.S. Line v. McGrath*, 188 F.2d 1000, 1003 (D.C. Cir.), *cert. denied*, 342 U.S. 816 (1951).

In addition, the IAAF argues that several of its members represent states which cannot be "foreign states" under § 1332(a) because they are colonies or dependencies of other, recognized states. Many courts, however, have found colonies or dependencies of recognized states to be "foreign states" for the purposes of diversity jurisdiction. *See Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1415 (1991); *Netherlands Shipmortgage Corp. v. Madias*, 717 F.2d 731 (2d Cir. 1983); *Creative Distributors, Ltd. v. Sari Niketan, Inc.*, No. 89 C 3614, 1989 WL 105210 (N.D. Ill. 1989); *Timco Eng'g, Inc. v. Rex & Co.*, 603 F. Supp. 925 (E.D. Pa. 1985); *cf. Tetra Finance (HK), Ltd. v. Shaheen*, 584 F. Supp. 847 (S.D.N.Y. 1984).

In *Wilson v. Humphreys (Cayman) Ltd.*, the Seventh Circuit stated that "the exercise of American judicial authority over the citizens of a British Dependent Territory implicates this country's relationship with the United Kingdom—precisely the raison d'etre for applying alienage jurisdiction." 916 F.2d at 1243. In this Court's opinion, the Seventh Circuit's reasoning applies not only to IAAF members representing the British Dependent Territories, but also to members representing any colony or dependency of a country recognized by the United States. Thus, the fact that several IAAF members represent colonies or dependencies of other, recognized states does not prevent this Court from exercising diversity jurisdiction.

3. Stateless Citizen

Finally, the IAAF asserts that the Northern Mariana Amateur Sports Association, which represents the Commonwealth of the Northern Mariana Islands ("CNMI"), has no citizenship for the purposes of diversity jurisdiction. CNMI citizens are United States citizens but, according to the IAAF, they are "stateless" because they are not citizens of a state or territory. Thus CNMI citizens may not sue under diversity jurisdiction. *Cf. Cresswell*

v. Sullivan & Cromwell, 922 F.2d 60 (2d Cir. 1990) (U.S. citizens domiciled abroad are "stateless" for the purposes of diversity jurisdiction. Therefore, partnership that included "stateless" citizens cannot be sued under diversity jurisdiction).

If the IAAF's argument were accepted, CNMI citizens would be the only class of United States citizens—other than citizens domiciled abroad—who are denied the right to sue under § 1332(a). The Court is reluctant to conclude that Congress would create a pocket of citizenry who are refused equal access to United States courts. Indeed, 48 U.S.C. § 1694(a) casts doubt upon the assertion that Congress intended to bar CNMI citizens from suing under § 1332(a). Section 1694a(a) provides in part:

> The District Court for the Northern Mariana Islands shall have the jurisdiction of a District Court of the United States, including, but not limited to, diversity jurisdiction provided for in section 1332 of Title 28. . . .

It seems highly unlikely that Congress would confer upon the District Court for the Northern Mariana Islands the power to exercise diversity jurisdiction, yet not permit any CNMI citizens to sue under such jurisdiction. Further, in *Yokeno v. Mafnas*, 973 F.2d 803 (9th Cir. 1992), a Japanese citizen brought suit against a CNMI citizen. The Ninth Circuit expressly stated that diversity jurisdiction would exist between a CNMI citizen and a Japanese citizen, but remanded the case back to district court for a determination on whether diversity had been obtained collusively. Thus, the courts, as well as Congress, have evinced an intent to permit CNMI citizens to sue under § 1332(a).

B. Review of the London Arbitration

Beyond the issue of diversity jurisdiction, the IAAF maintains that the Court lacks subject matter jurisdiction because Plaintiff's suit, in essence, seeks to set aside an

international arbitral decision (*i.e.*, the IAAF's decision regarding Plaintiff's use of steroids). Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 300 U.N. 38 ("the Convention"), such decisions may be set aside only by a "competent authority of the country in which . . . [the] award was made." *Id.* Article V, ¶ 1(e). The United States became a party to the Convention in 1970, and soon thereafter Congress enacted legislation implementing the provisions of the Convention into domestic law. 9 U.S.C. §§ 201-08. The United Kingdom is also a signatory to the Convention. Thus, according to the IAAF, this Court lacks jurisdiction to entertain Plaintiff's claims; Plaintiff can only bring suit in England because that is where the award was made.

Notably,

> the Convention applies only to awards resulting from arbitrations to which the parties have submitted voluntarily. If the arbitration were conducted by a permanent body to which the parties were obligated to bring their disputes regardless of their will, the proceedings are judicial rather than arbitral in character and the resulting award would not come within the purview of the Convention.

Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1061 n.54 (1961) (quoting the Official Report of the United States Delegation to the Convention). Thus, as evidence of each party's willingness to arbitrate, an agreement to arbitrate must be in writing to be enforceable under the Convention. Convention, Article II, ¶ 1. An "agreement in writing" is defined as "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." *Id.* Article II, ¶ 2.

In the instant case, there is no "agreement in writing" between Plaintiff and the IAAF. Ostensibly, then, the IAAF's decision regarding Mr. Reynolds does not come within the purview of the Convention and, as a result, the Convention does not defeat this Court's jurisdiction. Regardless of the writing requirement, Defendant claims that the Convention nonetheless precludes this Court from exercising jurisdiction over Plaintiff's lawsuit.

First, because Plaintiff asserted—and the Court found—that the IAAF violated his right to contractual due process by not providing a fair hearing in accordance with its rules, Default Op. at 19, the IAAF claims that Plaintiff cannot now disavow the existence of an agreement to arbitrate. The determinative issue, however, is whether the Convention is applicable to the decision rendered by the IAAF, thereby requiring this Court to abstain from hearing Plaintiff's suit. For the Convention to apply, there must be an "agreement in writing" to arbitrate. In the instant case, it is undisputed that there was no "agreement in writing" as defined by the Convention. Thus, this argument is without merit.

Second, Defendant maintains that Plaintiff cannot avoid an arbitral award by raising the Convention's writing requirement defense because he actually participated in an arbitration proceeding. In support, Defendant cites to *Minister of Defense v. Gould, Inc.*, 887 F.2d 1357 (9th Cir. 1989), wherein the Ninth Circuit held that acceptance of the Algerian Accords by the President of the United States constituted an "agreement in writing" between an American corporation and the government of Iran for purposes of the Convention. The Algerian Accords provided for the release of American hostages held in Iran and also established the Iran-U.S. Claims Tribunal ("Tribunal"), which gave American and Iranian nationals a forum to present their claims against either country or its citizens. *Id.* at 1359. The Ninth Circuit then went on to state that even if there were no "agreement in writing," the American corporation "ratified" the actions of

the United States by filing a claim and arbitrating it before the Tribunal. *Id.* at 1364.

Gould, however, is distinguishable because it involved overriding foreign policy considerations not found in the instant case. *See Dames & Moore v. Regan,* 453 U.S. 654, 686-88 (1981) (As a necessary incident to settling major foreign policy disputes, the President has authority to suspend actions in U.S. Courts which were brought by American nationals against Iran. Consequently, nationals may assert their claims against Iran only before the Tribunal.) These considerations require that courts uphold the ability of the President to force American nationals to submit their claims to arbitration. *See, e.g., id.* at 673-74 (discussing ability of President to override individual claimants when foreign policy at issue). Thus, in *Gould,* the policy favoring voluntary arbitration—as evidenced by an "agreement in writing"—was overridden by a presidential exercise of constitutional authority. Such is not the case here. *Gould* therefore lends little support to Defendant's argument that Plaintiff's alleged [6] participation in the IAAF arbitration precludes him from raising the writing requirement defense.

Last, Defendant asserts that because a written arbitration agreement exists between TAC and other IAAF members, the IAAF's decision may only be attacked in the courts of England. Defendant relies upon *International Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera,* 745 F. Supp. 172, 175-78 (S.D.N.Y. 1990) to support its claim that anyone challenging the IAAF's decision must bring suit in England. In *International Standard,* however, a written agreement to arbitrate existed between the parties. *Id.* at 174. Thus, that case is

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[6] Plaintiff contends that he was not a party to the arbitration. Instead, according to Plaintiff, the proceeding was between TAC and the IAAF. Mem. in Opp'n, at 49. The Court expresses no opinion as to whether the arbitration was between the IAAF and TAC or the IAAF and Plaintiff.

limited to the issue of setting aside an award under Article V of the Convention. As mentioned above, the issue before this Court is whether the Convention applies at all, thereby precluding review of Plaintiff's suit. Convention, Article II. Because there is no written agreement between the Plaintiff and the IAAF, the IAAF's decision with regard to Plaintiff does not come within the purview of the Convention. Consequently, the Convention does not bar Plaintiff's suit in this Court.

Having concluded that subject matter jurisdiction exists, the Court shall consider Defendant's remaining grounds for quashing the default judgment.

II. Personal Jurisdiction

For personal jurisdiction to exist over a nonresident defendant in a diversity case, the central concern is the relationship among the defendant, the forum, and the litigation. When presented with a jurisdictional dispute concerning the sufficiency of the defendant's contacts with the forum state, a district court must apply the law of the state in which it sits, subject to constitutional limitations. *Welsh v. Gibbs,* 631 F.2d 436, 439 (6th Cir. 1980). Thus, two basic prerequisites must be satisfied: the defendant must be amenable to suit under the forum state's long-arm statute and the exercise of jurisdiction over the defendant must not violate the Due Process Clause of the United States Constitution. *In-Flight Devices Corp. v. Van Dusen Air, Inc.,* 466 F.2d 220, 224 (6th Cir. 1972).

This two-tier analysis is required whenever personal jurisdiction is premised solely on conduct of the defendant as delineated in the Ohio's long-arm statute because "the cause of action *must* have arisen from that conduct." *Berning v. BBC, Inc.,* 575 F. Supp. 1354, 1357 (S.D. Ohio 1983) (interpreting § 2307.382(B), *amended by* § 2307.382(C)). If the Ohio long-arm statute does not provide a basis for the exercise of personal jurisdiction

over the nonresident defendant, jurisdiction is unavailable even if the exercise of such would not violate due process.

In the instant case, Plaintiff has alleged four causes of action: breach of contract; breach of contractual due process; defamation; and interference with business relations. The Court must first determine whether the Ohio long-arm statute provides a basis for asserting personal jurisdiction over Defendant with regard to each cause of action. If the statute does provide a basis, the Court shall proceed to the second tier of analysis and determine whether the assertion of personal jurisdiction violates due process.

A. Amenability to Suit Under Ohio's Long-arm Statute

The Ohio Revised Code provides in part:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
>
> (1) Transacting any business in this state;
>
> * * * *
>
> (3) Causing tortious injury by an act or omission in this state;
>
> * * * *
>
> (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;
>
> * * * *
>
> (C) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

O.R.C. § 2307.382.

Plaintiff has averred that the "transacting any business" provision of the Ohio long-arm statute applies to his contract and contractual due process claims. The Ohio Supreme Court has indicated that this provision is "very broadly worded and permit[s] jurisdiction over defendants who are *transacting any* business in Ohio." *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St. 3d 73, 75, 559 N.E.2d 477, 480 (1990), *cert. denied*, 111 S.Ct. 1619 (1991) (emphasis in original). Further, the word "any" has been defined to include "each," "every," and even the "slightest." *Lanier v. American Bd. of Endodontics*, 843 F.2d 901, 906 (6th Cir. 1988).

As the Court previously held, a contract existed between Plaintiff and the IAAF, and the IAAF breached its contractual obligations. Default Op. at 11. In addition to the contract, Plaintiff has demonstrated that the IAAF, through its officers and counsel, directly correspond with Plaintiff and Plaintiff's counsel in Ohio, telephoned Plaintiff's counsel in Ohio, and physically appeared in Ohio. Specifically, before initiating any litigation, Plaintiff's counsel requested documents from the IAAF and Manfred Donike, a member of the IAAF Medical and Doping Commissions. Pl.'s Exh. 21. Mark Gray, counsel for the IAAF, responded to Plaintiff's request in a letter dated December 6, 1990. Pl.'s Exh. 11. In this same letter, Mr. Gay requested that all correspondence to the IAAF be sent to TAC. TAC would then contact the IAAF if it needed assistance.

Moreover, Manfred Donike voluntarily appeared in Ohio to testify against Plaintiff at a TAC Doping Control Board hearing.[7] In addition, Ollan Cassell, Vice-

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[7] Defendant claims that Donike appeared at the hearing at TAC's request, and not as a representative of the IAAF. But the Court entertains no doubt that Donike appeared as a representative of the IAAF. Indeed, in a sworn declaration used as evidence in an earlier TAC hearing, Donike stated that "[a]s a result of my position with the IAAF, I had occasion personally to review Butch

President of the IAAF and Executive Director of TAC, travelled to Ohio and repeatedly communicated with Plaintiff concerning his suspension and the IAAF Council decision to extend the suspension. Pl.'s Exh. 9, 13. Finally, with respect to an IAAF hearing held in May 1992, Mark Gay telephoned and corresponded with Plaintiff's counsel. Pl.'s Exh. 23. At the suggestion of Mr. Gay, a telephone conference call was held between TAC, Plaintiff's counsel, and Mr. Lauri Tarasti, the chairman of the IAAF Arbitration Panel. The IAAF arranged for Mr. Tarasti's presence at the conference call.

Defendant does not contest the existence of these contacts with Ohio. Rather, Defendant claims the contacts do not constitute the transaction of business within the meaning of O.R.C. § 2307.382(A)(1). As mentioned above, however, Plaintiff need only show that Defendant conducted the slightest act of business in Ohio to satisfy § 2307.382(A)(1). Upon consideration, the Court finds that Plaintiff has met his burden.

This conclusion is buttressed by the Court's determination that TAC acts as the agent of the IAAF in this country. In Ohio, the relationship of principal and agent exists when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks. *Hanson v. Kynast,* 24 Ohio St. 3d 171, paragraph one of syllabus, 494 N.E.2d 1091 (1986). As the events occurring before and after the commencement of Reynolds' suit clearly indicate, TAC acts on behalf of the IAAF and in accordance with its rules. Therefore, jurisdiction over the IAAF may also be based upon TAC's contacts with Ohio and, as a result, the Court concludes that the IAAF has transacted business in Ohio through its own acts, and by the acts of its agent, TAC.

Reynolds' drug test results. . . ." Pl.'s Ex. 22. Thus, Donike's appearance at the Ohio hearing arose out of his association with the IAAF.

Defendant insists that even if it did transact business in Ohio, Plaintiff's contract and contractual due process claims did not arise out of any business transacted there. O.R.C. § 2307.382(C). Instead, according to Defendant, Plaintiff's causes of action arose from "a urine sample taken in Monaco, analyzed in France, and confirmed by an international arbitration hearing held in London." Def.'s Mem. in Support at 9. The Court does not believe that Plaintiff's connections with Defendant should be fragmented in this fashion. As previously mentioned, a contractual relationship existed between the IAAF and Plaintiff. Under this relationship, the IAAF established the rules and regulations governing the procedural process by which Plaintiff would be tested for prohibited substances. Further, the contract provided for a hearing process if the use of prohibited substance was attributed to Plaintiff. The IAAF's contacts in Ohio related entirely to the process of considering whether or not Plaintiff had taken prohibited substances. Thus, Plaintiff's breach of contract and contractual due process claims clearly arose from Defendant's transaction of business in Ohio. *See Lanier v. American Bd. of Endodontics,* 843 F.2d at 908.

Plaintiff has also averred that two of the three "tortious conduct" provisions of the Ohio long-arm statute, subsections (A)(3) and (A)(6), apply to his claims for defamation and tortious interference with business relations. Section 2307.382(A)(3) provides that a court may exercise jurisdiction over a person when that person caused tortious injury by an act or omission in this state. Section 2307.382(A)(6) provides for jurisdiction when a tortious injury is caused in this state by a party when he might have reasonably expected that some person would be injured thereby in this state.

Defendant defamed Plaintiff and tortiously interfered with his business relations by issuing an international press release wherein the use of a controlled substance,

nandrolone, was falsely attributed to Plaintiff. Not surprisingly, periodicals disseminated this defamatory material—including periodicals circulated in Ohio. Indeed, the primary purpose of a press release is to distribute information to the press publication. As a result, Plaintiff suffered economic loss. Specifically, NIKE, Inc. terminated its endorsement contract with Plaintiff.[8] Pl.'s Exh. 24. Three Ohio corporations—Kroger, Firestone & Rubber Corporation, and Ross Laboratories—also terminated endorsement contracts with Plaintiff. Finally, Plaintiff missed out on future endorsement contracts and appearance fees. Consequently, Plaintiff suffered a substantial amount of lost income, *see* Pl.'s Exh. 26, and, more importantly, his reputation was harmed by Defendant's actions.

Plaintiff has clearly suffered tortious injury in Ohio as a result of Defendant's tortious acts. The IAAF claims, however, that it did not know Plaintiff was an Ohio citizen and, therefore, could not reasonably foresee that its tortious acts would harm Plaintiff in Ohio. Even if this were so, it is of little legal import. The IAAF intentionally and purposefully directed their tortious acts toward Plaintiff, and such acts had a devastating effect upon Plaintiff. Hence, it would be reasonable for the IAAF to anticipate being hailed into court where the Plaintiff resides (*i.e.*, Ohio). *See Calder v. Jones*, 465 U.S. 783 (1984).

B. Due Process

Aside from determining whether the IAAF is amenable to suit in Ohio pursuant to the Ohio long-arm statute, this Court must also determine whether the exercise of jurisdiction over the IAAF comports with the dictates of Due Process:

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[8] Such termination also resulted from direct communications between NIKE and the IAAF. Pl.'s Exh. 25.

> Due Process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). In determining whether this standard has been satisfied, this Court is guided by a three-part test adopted by the Sixth Circuit: (1) whether the defendant purposely availed itself of the privilege of acting in the forum state or causing a consequence in the forum state: (2) whether the cause of action arose from the defendant's activities in the forum state; and (3) whether the defendant's actions or the consequences of its actions had a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable. *See, e.g., Southern Machine Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968); *In-Flight Devices*, 466 F.2d at 226. This test is not to be mechanically applied, and it does not "eliminate the need to consider the jurisdictional facts of each case individually, to make judgments as to the substantiality of contacts with the forum state and the fairness and justice of subjecting a specific defendant to the *in personam* jurisdiction of the forum state." *Id.* at 225-26. Rather, "[i]t is imperative that it be understood that the flexibility, and therein the virtue, of the *International Shoe* test is retained in the third condition and no mechanical consideration of the first two elements of the test can eliminate the need for an appraisal of the overall circumstances of each case if jurisdiction is to be found." *Id.* at 226.

The first criterion—a showing that the defendant has purposefully availed itself of the privilege of transacting business in Ohio and thereby invoked the benefits and protections of its laws—is "the *sine qua non* for *in personam* jurisdiction." *Southern Machine Co.*, 401 F.2d at

381-382. Purposeful availment, however, is not contingent upon the Defendant's physical contacts with Ohio. All that is required is that the Defendant's actions be " 'purposefully directed' toward residents of another State." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476 (1985).

There is no question that Defendant's activities were purposefully directed toward Plaintiff, a resident of Ohio. First, Defendant entered into a contract with Plaintiff, thereby creating continuing obligations between itself and Plaintiff. *Id.* at 475-76. In addition, Defendant, and its agent, TAC, corresponded with Plaintiff and Plaintiff's counsel in Ohio, and travelled to Ohio. Defendant argues that because much of the Ohio contacts were initiated by Plaintiff, it did not purposefully avail itself of the privilege of acting in Ohio. Defendant's argument misses the point: "[T]he question of which party solicited the . . . interface is irrelevant, so long as defendant then directed its activities to the forum resident." *Lanier v. American Bd. of Endodontics,* 843 F.2d at 910 (citing *Southern Machine Co.,* 401 F.2d at 382)).

Second, Defendant's defamatory statements were directly aimed at Plaintiff. Defendant issued a press release, the sole purpose of which was to disseminate defamatory information about the Plaintiff. Such information would obviously have a devastating impact on Plaintiff, and this impact would be most strongly felt in Ohio—the state where Plaintiff was domiciled. *Calder v. Jones,* 465 U.S. at 789-90. *See also Hugel v. McNell,* 886 F.2d 1 (1st Cir. 1989) (Personal jurisdiction is proper when effects of defamatory statements made outside state are most strongly felt in forum state—state of Plaintiff's domicile); *Laxalt v. McClatchy,* 622 F. Supp. 737 (D.C. Nev. 1985) (same). The fact that Defendant did not personally circulate the information in Ohio is irrelevant. *Calder v. Jones,* 465 U.S. at 789.

The second criterion is also satisfied: Plaintiff's causes of action arise in Ohio. The IAAF's breach of Plaintiff's contract and its consequences were made possible only by the IAAF's transaction of business with Plaintiff in Ohio. *See Lanier v. American Bd. of Endodontics*, 843 F.2d at 907. Moreover, the defamatory statements were published in Ohio, and the economic impact of the IAAF's tortious interference with Plaintiff's business relationships has occurred in Ohio.

Once the first two criteria are satisfied, "[a] defendant cannot defeat jurisdiction unless it presents 'a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" *Id.* at 910 (quoting *Burger King*, 471 U.S. at 477). Defendant advances several arguments in an attempt to show that jurisdiction over it would be unreasonable. Basically, Defendant argues that jurisdiction by this Court, or by any court located in the United States, would be unreasonable because the IAAF and its members have—for perfectly valid reasons—agreed otherwise, and that U.S. courts should abide by this agreement. The Court is not persuaded.

Defendant breached its contract with Plaintiff, deprived him of right to contractual due process, defamed him, and interfered with his ability to earn a living, all of which cost Plaintiff millions of dollars in economic harm along with immeasurable dollars in emotional harm. Further, Defendant threatened Plaintiff (and other U.S. athletes) with additional harm if Plaintiff did not terminate his suit against the IAAF. Throughout all of this, the IAAF has insisted that Plaintiff was not entitled to any form of recourse against it, and that it could never be held accountable for its misconduct—no matter how egregious.

Belatedly, Defendant now claims that Plaintiff could have contested its doping decision in an English court.

In light of pronouncements[9] by the IAAF's President, Primo Nebiolo, the Court views this claim with some skepticism.[10] Nevertheless, even if the IAAF were to accept the jurisdiction of English courts to review its doping decisions, the Court finds it unreasonable to require Plaintiff—who has already expended a considerable amount of time and money pursuing a remedy in this Court—to commence a new suit in an English court. Plaintiff, as an individual, has limited economic resources. In contrast, the IAAF has much greater resources, including world-wide business and legal contacts. In the United States alone, the IAAF organizes meets, negotiations contracts with major television networks, including NBC, Cablevision and Turner Broadcasting, and with corporate sponsors, including Mobil and Coca Cola. Simply put, the IAAF has aptly demonstrated its ability to conduct business in the U.S., and its familiarity with U.S. laws. Therefore, the burden of litigating in the United States does not outweigh the prejudice that would occur to Plaintiff by requiring him to bring a new suit in England.

Additionally, as the Court has previously stated, it is simply an unacceptable position that the courts of this country cannot protect the individual rights of the United States citizens where the rights are threatened by an association which has significant contacts with this country, which acts through an agent organization in this country,

[9] Primo Nebiolo, along with other IAAF officials, has repeatedly taken the position that the IAAF's doping decisions are unimpeachable, and that the IAAF will never accept a contrary decision by any court in the world. *See* Pl.'s Ex. 30, 31; Preliminary Injunction Op. at 14.

[10] Moreover, in a proceeding before an English court, the IAAF declared that, should banned athletes seek to challenge IAAF eligibility determinations, they would have to bring an action in each country where they sought to compete. *Gasser v. Stinson*, No. CH-88-6-2191 (1988), Def's Mem in Support of Mot. to Quash, Exh. 2 at 36.

and which exercises significant control over athletes and athletic events in this country. Thus, Defendant has failed to persuade the Court that the exercise of personal jurisdiction would be unreasonable.

III. Service of Process

In issue here is whether Defendant was properly served with process. Notably, there is no dispute that Defendant was actually served: Plaintiff's attorney first sent the summons and complaint to Mr. Ollan Cassell, the IAAF's Vice-President, by certified mail [11] and then personally served Mr. Cassell in New Orleans. This manner of service undeniably complied with Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure. According to Defendant, however, service under the Federal Rules is not available in cases like the instant action where the federal court predicates its jurisdiction on the forum state's long-arm statute. Rather, Defendant maintains that a federal court must look to the service provisions of the forum state's long-arm statute as dictated in Federal Rule 4(e). Hence, Defendant claims that the service of process was improper because it did not comport with the Ohio Rules of Civil Procedure.

Rule 4.3(B)(1) of the Ohio Rules of Civil Procedure provides that out-of-state service generally should be made by certified mail. The Rule then goes on to state: "[t]he clerk shall place a copy of the process and complaint . . . to be served in an envelope. He shall address the envelope. . . . He shall affix adequate postage and place the sealed envelope in the United States mail as certified mail return receipt requested. . . ." Ohio R. Civ. P. 4(B)(1). According to Defendant, because Plaintiff's counsel—and not the clerk—was responsible for sending the summons and complaint via certified mail, this manner of service was ineffective.

[11] An agent of Defendant acknowledged receipt of the summons served by certified mail.

"Certified mail service under Civ. R. 4.3(B)(1) is valid where the envelope containing the documents to be served is delivered to a person other than the defendant, at the defendant's address." *Mitchell v. Mitchell*, 64 Ohio St. 2d 49, 51, 413 N.E.2d 1182, 1183 (1980); *see also Castellano v. Kosydar*, 42 Ohio St. 2d 107, 111, 326 N.E.2d 686, 689 (1985). It is undisputed that Defendant was served, had notice of the suit, and chose not to appear. The fact that Plaintiff's attorney, and not a court employee, sent process by certified mail is of no importance. Indeed, the local Rules for the Southern District of Ohio unequivocally state that when service is to be made by certified mail under the Ohio Rules, plaintiff's attorney—and not the clerk—is "to address the envelope to the person to be served [and] place a copy of the summons . . . to be served in the envelope." S.D. Ohio L. R. 4.1. If this Court were to accept Defendant's literal reading of Rule 4.3, a plaintiff serving process pursuant to this Court's local rules would never effectively serve process pursuant to the Ohio Rules. Hence, the Court rejects Defendant's reading of Rule 4.3(B)(1). *Cf. KDI Precision Products, Inc. v. Radical Stampings, Inc.*, 620 F. Supp. 786, 792 (S.D. Ohio 1985) (Plaintiff served process by ordinary mail in accordance with Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure. Court held that such service also satisfied Rule 4.3(B)(1) under the Ohio Rules of Civil Procedure, notwithstanding the fact that Rule 4.3(B)(1) provides for service by certified mail.)

Moreover, even if one accepts the argument that service of process was insufficient (and this Court does not), Defendant has waived the right to assert the defense that service of process was insufficient in this matter. *See Walsh v. SmithKline Beckman, et al.*, No. 89-5833, 1990 WL 76460 (E.D. Pa. June 6, 1990); *Adidas Sportschuhfabriken Adi Dassler Stiftung & Co., K.G., et al. v. Steven Cheung, et al.*, No. 87 Civ. 8989, 1990 WL 48063 (S.D.N.Y. April 10, 1990). Defendant indisput-

ably received notice, but made the calculated choice not to appear in the action. For almost 10 months after receiving notice of Plaintiff's suit, Defendant never contested service of process.

> It was only upon the [attempted garnishment] of [Defendant's] assets that [Defendant] alleged that service was improper and attempted to collaterally attack the default judgment. It is too late for such an argument. This litigation has been underway for [over a year]. [Plaintiff has] expended significant time and money in the pursuit of a recovery from [Defendant], and the Court has devoted substantial time and effort to the adjudication of this case. [Defendant] had actual notice of this litigation and they are estopped from arguing form over substance.

Adidas Sportschuhfabriken, 1990 WL 48063, at *5. Accordingly, the Court concludes Defendant has, under equitable principles, waived the right to claim that service of process was insufficient in this matter. *Walsh*, 1990 WL 76460, at *2.

Conclusion

Upon consideration and being duly advised, the Court finds Defendant's motion to quash the default judgment to be without merit and it is, therefore, DENIED.

In addition to the motion to quash, Defendant moves for an Order modifying or clarifying the Order previously entered by this Court on February 19, 1993. The Court hereby finds the Defendant's motion to be meritorious and it is, therefore, GRANTED. Thus, for clarification purposes, the Court never intended the February 19, 1993 Order to prohibit the IAAF from raising its jurisdictional defense in response to the garnishment action filed by Plaintiff in the United States District Court for the Eastern District of Virginia.

IT IS SO ORDERED.

/s/ Joseph Kinneary
United States District Judge

APPENDIX D

[Filed Dec. 3, 1992]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-92-452

HARRY L. REYNOLDS, JR.,
Plaintiff,

v.

INTERNATIONAL AMATEUR ATHLETIC FEDERATION,
Defendant.

OPINION AND ORDER

This matter comes before the Court to consider the Plaintiff's motion for default judgment. Fed. R. Civ. P. 55(b). Defendant International Amateur Athletic Federation ("IAAF") has neither filed an answer to the Complaint nor made any other type of appearance in this action. Upon the entry of default by the Clerk's Office, this Court conducted an evidentiary hearing on October 20, 1992.[1] On November 12, 1992, Plaintiff filed a post-hearing memorandum, and the record is now ripe for decision. As with all default situations, the well-pleaded facts alleged in the Complaint are deemed admitted upon the entry of default. 6 James W. Moore, et al., *Moore's Federal Practice* ¶ 55.02[2]. Thus, while liability is essentially deemed admitted, damages are not. *See Lothschuetz v. Carpenter*, 898 F.2d 1200, 1205 (6th Cir. 1990).

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[1] All references to the transcript of this hearing will be cited as "Tr. at ——."

I.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Plaintiff, Harry L. Reynolds, Jr., is a world-class amateur track athlete. This action arises out of Reynolds' appearance in the Herculis '90 International track and field competition in Monte Carlo, Monaco on August 12, 1990. Following the meet, Reynolds was randomly chosen to submit a urine sample, and on October 18, 1990 he was notified that the sample had tested positive for the anabolic steroid nandrolone. The IAAF immediately suspended Reynolds pending a hearing by Reynolds' national track and field governing body, The Athletics Congress of the U.S.A., Inc. ["TAC"].

Rather than seek a hearing from TAC, Reynolds sought the intervention of this Court in a case styled *Reynolds v. The Athletics Congress of the U.S.A. Inc., et al.*, No. C-2-91-003 (S.D. Ohio 1991) (Kinneary, J.) ("Reynolds I"). The Complaint in Reynolds I averred that Plaintiff Reynolds was a world-class track and field athlete falsely accused by the IAAF of steroid use and wrongfully suspended from competition for two years—August 12, 1990 to August 11, 1992. On March 19, 1991, this Court held that Reynolds failed to exhaust his administrative remedies and stayed the action pending such exhaustion. On June 11, 1991 the Sixth Circuit Court of Appeals vacated the judgment and ordered the entire case dismissed on the ground that exhaustion of administrative remedies is a precondition to the exercise of subject matter jurisdiction.

Plaintiff then attempted to exhaust the administrative process available to him. Pursuant to the Amateur Sports Act of 1978, 38 U.S.C. §§ 371-96, and the United States Olympic Committee Constitution, Reynolds first participated in an expedited American Arbitration Association proceeding on June 7, 1991. On June 10, 1991, the arbitrator issued a decision essentially exonerating Reynolds on the charge of steroid use:

> The arbitrator finds that the Respondent's suspension of Mr. Reynolds was improper; that there is clear and convincing evidence that the "A" sample and the "B" sample did not emanate from the same person and the "B" sample did not confirm the "A" sample; that there is substantial evidence that neither the "A" sample or the "B" sample emanated from the Claimant; and that Claimant should be declared eligible to compete in the qualifying rounds for the World Game Championships on June 12, 1991.

Complaint Ex. G, Findings and Award of Arbitrator, at 3.

Both TAC and the IAAF refused to accept the arbitrator's decision for the alleged reason that such proceedings are inconsistent with the IAAF's post-suspension administrative adjudication process as provided in IAAF Rule 59. Reynolds' request to the USOC to enforce the decision was denied.

TAC, as the organization required by the IAAF to provide post-suspension administrative adjudication of any dispute, eventually scheduled a hearing for September 13, 1991.[2] After a 12-hour hearing and two weeks of deliberation, the TAC hearing panel announced its decision exonerating Reynolds:

> The panel, after hearing the matters before it, the testimony of witnesses and expert witnesses from both sides, documents and exhibits, hereby finds that Mr. Harry "Butch" Reynolds has cast substantial doubt on the validity of the drug test attributed to him. The panel finds that the "B" sample positive result reported by the Lafarge Laboratory has been impeached by clear and convincing evidence.

Pl's Ex. 20, at 10-11.

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[2] All references to the transcript of this hearing will be cited as "TAC Hr'g Tr. at ——."

Notwithstanding TAC's conclusion, IAAF refused to end Reynolds' suspension. Pursuant to its own Rule 20—which provides for the arbitration of disputes between itself and its member associations—the IAAF ordered, on November 17, 1991, an arbitration of the TAC hearing decision. On May 10 and 11, 1992, the IAAF and TAC presented their positions to a three-member arbitration panel.[3] After only two hours of deliberation, the panel issued a seven page decision finding there to be "no doubt" as to reliability of the laboratory's findings. Complaint Ex. I, at 7.

On May 27, 1992,[4] Plaintiff filed his Verified Complaint alleging four causes of action: (1) breach of contract, (2) breach of contractual due process, (3) defamation, and (4) tortious interference with business relations. The Complaint seeks both injunctive relief and damages, as well as a declaration that the suspension imposed upon Plaintiff is void.

On May 28, this Court held an informal preliminary conference to discuss the possible issuance of a temporary restraining order against the IAAF. Although an official representative of the IAAF was not present, counsel for the IAAF in Reynolds I was notified of the conference and did appear to argue on the IAAF's behalf, although she expressly informed the Court at that time that she had been unable to contact the IAAF and had not yet been retained to represent the IAAF in the current action. It is now evident that rather than retain counsel to dispute this Court's jurisdiction as it did in Reynolds I, the IAAF has decided to contest the jurisdiction of this Court by not appearing at all.

At the informal conference, the Court granted Plaintiff's request for a temporary restraining order which

[3] All references to the May 10 transcript of this hearing will be cited as "IAAF Hr'g Tr. at ——," while all references to the May 11 transcript will be cited as "IAAF Hr'g Tr., Part 2, at ——."

[4] Hereinafter, unless otherwise noted, all dates occurred in 1992.

precluded Defendant IAAF from interfering with Plaintiff's ability to compete in international and national track and field competitions, including qualifying races to establish his eligibility to compete in the United States track and field Olympic Trials in New Orleans, Louisiana on June 19-27. On June 8, the TRO was extended for an additional 10 days.

On June 17, this Court conducted an evidentiary hearing on Plaintiff's request to transform the TRO into a preliminary injunction. Although the IAAF declined to appear, TAC intervened—at the behest of the IAAF, *see* Pl's Ex. 23—to oppose the preliminary injunction.[5] Additionally, athletes Steve Lewis, Danny Everett, and Antonio Pettigrew, intervened to oppose the preliminary injunction, and the United States Olympic Committee ("USOC") appeared as *amicus curiae*.

On the morning of June 19, this Court issued an Opinion and Order finding jurisdiction over Defendant IAAF and granting Plaintiff's request for preliminary injunctive relief. Later that same day, TAC filed a notice of appeal and an application for an emergency stay of this Court's Opinion and Order with the United States Court of Appeals for the Sixth Circuit. In the absence of an available panel, the application was referred to a single judge. At approximately 7:00 p.m. that evening, Circuit Judge Eugene Siler granted TAC's application based, in part, upon his conclusion that the IAAF's threat of "contamination" made the potential harm to other athletes greater than the harm Plaintiff would suffer by reason of being excluded from the Olympic Trials.[6]

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[5] After the hearing, TAC submitted a memorandum challenging the subject matter jurisdiction of the Court. *See* Supplemental Memorandum of Intervenor the Athletics Congress Regarding the Jurisdiction of this Court to Enter Relief Sought by Plaintiff, filed June 18, 1992.

[6] "Contamination" refers to the procedure whereby the IAAF suspends any athlete who participates in a track and field event in which an already-suspended athlete participates.

On the morning of June 20, Plaintiff filed an emergency application with United States Supreme Court Justice John Paul Stevens, in his capacity as Circuit Justice for the Sixth Circuit, for an order vacating the emergency order of Judge Siler. At approximately 2:00 p.m. that afternoon, Justice Stevens issued an opinion granting Plaintiff's application for an emergency stay, thereby reinstating this Court's preliminary injunction against the IAAF. Along with finding this Court's preliminary injunction opinion to be "persuasive," Stevens stated that "[t]he IAAF's threat to enforce its eligibility decision—no matter how arbitrary or erroneous it may be—by punishing innocent third parties cannot be permitted to influence a fair and impartial adjudication of applicant's claims."

Upon receiving Justice Stevens' Order on June 20, TAC warned all 400 meter athletes that, if they competed with Plaintiff, they would risk suspension by the IAAF even though this Court's preliminary injunction specifically restrained both TAC and the IAAF from taking action against any athlete who competed with Plaintiff. Tr. at 75. In addition, TAC postponed the first round of the 400 meter competition for that day and filed an application to the full Supreme Court to vacate Justice Stevens' Stay. Tr. at 76-77. This request was denied later on June 20.

Although Plaintiff was eventually allowed to compete in the Olympic Trials, and ultimately earned a place as an alternate member of the United States Olympic Track and Field team, TAC and the USOC removed Plaintiff's name from the roster of Olympic athletes and refused to take Plaintiff to Barcelona with the United States team purportedly because the IAAF refused to declare Plaintiff eligible to compete in the Olympics. Tr. at 82-84. Immediately upon the conclusion of the 1992 Summer Olympic Games, the IAAF extended Plaintiff's suspen-

sion for an additional four months, from August 12, 1992 to December 31, 1992, for participating in the United States Olympic Trials in contravention of its proscription, despite this Court's preliminary injunction to the contrary. Tr. at 84.

On September 28, 1992, Plaintiff filed a Supplemental Complaint in this action, outlining the events which occurred since the filing of the original Complaint. Because no responsive pleading was filed in response to either complaint, Plaintiff moved this Court for a default judgment on October 1 with respect to the original Verified Complaint, and on October 8 with respect to the Supplemental Complaint. On October 20, this Court conducted an evidentiary hearing on the motion for default judgment pursuant to Federal Rule of Civil Procedure 55(b). Despite the fact that the IAAF's liability is deemed admitted by its failure to enter an appearance in this action, Plaintiff presented extensive evidence respecting not only damages, but also liability. As expected, the IAAF did not appear at the hearing.

II.

SUBJECT MATTER JURISDICTION

Reynolds is a citizen of Ohio and the IAAF is an alien association. Thus, because there exists both diversity of citizenship between the parties and an amount in controversy exceeding $50,000, this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

Throughout these proceedings, however, TAC has argued on behalf of the IAAF that the Amateur Sports Act, 36 U.S.C. § 371, *et seq.* (the "Act"), limits the subject matter jurisdiction of district courts to review the eligibility determinations made by national governing bodies such as TAC. The Court finds this argument to be without merit. It is axiomatic that a strong presumption in favor of judicial review exists and that this pre-

sumption may be overcome only by specific language establishing Congress' clear intent to preclude such review. *See, e.g., Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). A review of the entire Act reveals that it does not mention the question of judicial review, let alone specifically preclude it.[7] Without such language, this Court will not presume that access to the federal courts is foreclosed.[8]

III.

PERSONAL JURISDICTION

This Court previously outlined in detail the evidence supporting the exercise of personal jurisdiction over the IAAF, *see* Opinion and Order, June 19, 1992, at 6-19, and such evidence will not be recounted here. In addition to the factors outlined in its previous Opinion and Order, however, the record now reveals the following additional contacts between Plaintiff, this forum, and the IAAF:

> (1) Professor Manfred Donike, a member of the IAAF Doping Commission, voluntarily came to Columbus in his official capacity to testify against Plaintiff in the TAC Doping Control Board hearing, a hearing held outside of the judicial process. Tr. at 36; Prelim. Inj. Hr'g Tr. at 45-46.[9]

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[7] Indeed, as the Plaintiff points out, the private corporation created by Congress in the Act, the USOC, expressly provides for legal action in its Bylaws. USOC Bylaws, Chapter IX, Section 2.

[8] Moreover, because Congress delegated the authority to coordinate amateur athletics to private entities rather than governmental actors, such delegation may be constitutionally impermissible absent the opportunity for judicial review. *See Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1994); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944).

[9] This and all future references to "Prelim. Inj. Hr'g. Tr." refer to the June 17, 1992 hearing conducted by this Court.

(2) Mark Gay, counsel for the IAAF, repeatedly corresponded with counsel for Plaintiff in Columbus with respect to both the TAC and IAAF hearings. *See* Pl's Ex. 35 [10]; IAAF Hr'g Exs. 228, 230, 233.

(3) Ollan Cassell, Vice-President of the IAAF and Executive Director of TAC, has traveled to Columbus, Ohio, and has repeatedly communicated with Plaintiff in Ohio regarding both Plaintiff's original suspension and the IAAF Council decision to extend Plaintiff's suspension. Tr. at 80, 85.

(4) The IAAF's suspension of Plaintiff resulted in the loss of endorsement contracts with Ohio corporations. Tr. at 99, 103-04.

Given these and all the previous contacts established by the Plaintiff, the Court finds that the IAAF is amenable to suit in Ohio under Ohio's long-arm statute and that such exercise of jurisdiction comports with the dictates of due process.

IV.

LIABILITY OF THE IAAF ON PLAINTIFF'S CLAIMS

In his two Complaints Plaintiff has alleged four causes of action: (1) breach of contract, (2) breach of contractual due process, (3) defamation, and (4) tortious interference with business relations. As previously noted, the IAAF has conceded its liability as a result of its default in this action; however, the evidence presented by Plaintiff is overwhelmingly sufficient to demonstrate the IAAF's liability with regard to each cause of action.

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[10] This Court granted Plaintiff's motion to have all evidence received in connection with the application for preliminary injunction made part of the record of the October 20, 1992 hearing on the motion for default judgment. Thus, no differentiation will be made between the evidence offered during each of the hearings and the exhibits will be cited uniformly as "Pl's Ex. ——."

A. Breach of Contract

It is clear that the relationship between Plaintiff and the IAAF is contractual in nature, *see, e.g., California State University v. NCAA*, 47 Cal. App.3d 533, 121 Cal. Rptr. 85 (1975); *Barile v. University of Virginia*, 2 Ohio App. 3d 233, 441 N.E.2d 608 (1981); *Levy v. Amateur Skating Union*, 288 N.Y.S.2d 300, 56 Misc. 2d 257 (1968), and that the IAAF breached it contractual obligations. As part of its contract with athletes around the world, the IAAF has established rules and regulations governing the procedural process by which an athlete may be tested for prohibited substances, and a hearing process if the use of a prohibited substance is attributed to an athlete. All of the evidence presented in this action leads to the inescapable conclusion that the IAAF breached those rules and regulations with respect to Mr. Reynolds. The following is a listing of some of the most egregious procedural and substantive violations committed by the IAAF in its handling of Plaintiff's case—beginning with the point at which Mr. Reynolds provided a urine sample in Monaco and continuing to the present.

1. *Lack of chain of custody documentation*

The fundamental purpose of chain of custody documentation is to insure that the urine sample provided by an athlete is the actual sample tested. The evidence before the Court reveals that the only documents which exist with respect to Mr. Reynolds' "A" sample are incapable of a definitive interpretation, *see* Prelim. Inj. Tr. at 115; Pl's Ex. 12, and that little or no documentation exists with respect to his "B" sample.[11] Prelim. Inj.

[11] When asked by counsel what percentage of documentation that should have been available for inspection and review by Mr. Reynolds was actually made available to him, Dr. Black responded that "over 50 percent" of the information was missing, and that Reynolds has received "about 30 percent" of the information that should have been generated as a consequence of the testing. Tr. at 20.

Tr. at 87-88; Pl's Ex. 6. *See also* Prelim. Inj. Tr. at 81-83; Pl's Ex. 16.

2. *The official laboratory report is internally inconsistent*

Plaintiff's expert, Dr. David Black,[12] testified extensively with respect to the apparent inconsistency contained in the official laboratory report. As is the usual procedure, Plaintiff's urine sample was purportedly divided into an "A" and a "B" portion at the time of its collection and each was marked with the designation "H5." Prelim. Inj. Tr. at 114; Pl's Ex. 5, at 4. However, the report indicates that an "A" sample positive test result for nandrolone corresponded to the "H6" sample, not the "H5" sample. Prelim. Inj. Tr. at 115; Pl's Ex. 12. The "H6" sample was the *fifth* sample tested in sequence and belonged to an East German Athlete. Prelim. Inj. Tr. at 115; Pl's Ex. 5, at 12. Dr. Black concluded that the laboratory report was so "internally inconsistent" that it "fails to provide evidence that any sample collected from Mr. Reynolds contained the presence of nandrolone metabolites." Prelim. Inj. Tr. at 75.

3. *The "B" urine sample did not confirm the "A" urine sample*

Dr. Black testified that, in direct contravention of IAAF/IOC laboratory testing protocols, the LaFarge Laboratory failed to use an "internal standard" when it tested the "B" sample. Tr. at 39-41; Prelim. Inj. Tr. at 120. As he explained, an internal standard is a known compound added to the sample in order to facilitate a

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[12] Dr. Black holds a Ph.D in Forensic Toxicology from the University of Maryland School of Medicine, Pathology Department. He is formerly the Director of both Vanderbilt University's Forensic/Clinical Toxicology Laboratory and Athletic Drug Testing Laboratory. He currently serves as President and Director and the Aegis Analytical Laboratories, Inc.

critical assessment of the accuracy of sample preparation and of the analysis being generated by the Gas Chromatography Mass Spectrometry machine, Tr. at 39-40, and is an "essential" part of the testing process. Prelim. Inj. Tr. at 91. In testing Reynolds' "B" sample, no internal standard was used.

Instead, the LaFarge Laboratory decided to use testosterone, a naturally occurring steroid in every male athlete's urine, to measure for the presence of nandrolone. Tr. at 39. Dr. Black testified that this was not acceptable laboratory procedure, Prelim. Inj. Tr. at 121, and that the two principal IAAF experts could not even agree as to the location of testosterone in the data.[13] In his opinion, "the inability to identify testosterone . . . absolutely draws into question the ability of the facility to properly identify whether or not there is a prohibited substance present." Tr. at 40-41.

Even assuming that the LaFarge Laboratory correctly identified testosterone, Dr. Black testified that the ratio of testosterone to epitestosterone—which serves as a "fingerprint" and should be the same for all samples originating from the same source—was not the same for the two samples purportedly belonging to Reynolds. Tr. at 29-34. The result, he opined, "is that the "B" sample is not associated or related in any way to the "A" sample. They have two completely different [testosterone/epitestosterone] ratios and profiles." Tr. at 34. When asked whether this implies that the two samples were taken from different individuals, he replied that that "would be

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[13] Mr. LaFarge placed the testosterone in one particular location, and Plaintiff was initially suspended based upon that placement. Tr. at 33. Almost a year later, at the TAC hearing on September 13, 1991, IAAF expert Dr. Donike stated that LaFarge had incorrectly located the testosterone. He determined that it should be in a different location, and later proceeded to change his mind for a third time. Tr. at 30-39.

the logical and reasonable conclusion to be reached." *Id.*[14]

4. *The IAAF Doping Commission failed to convene prior to Plaintiff's suspension*

Rule 59(2) of the IAAF Rules Concerning Control of Doping Abuse provides that athletes may be barred from competition only upon a determination that a doping offense has occurred. IAAF Rule 55 provides that a doping offense occurs when a "prohibited substance is found to be present within the athlete's body tissue or fluids." The IAAF Procedural Guidelines for Doping Control require a meeting of the IAAF Doping Commission to evaluate the relevant laboratory data to insure that the laboratory's conclusion is correct:

> Once testing on the reserve "B" sample is complete, the laboratory report should be *sent to the Doping Commission* as well as, in due course, a copy of the relevant laboratory data.

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[14] It is interesting to note that in another case involving a track athlete accused of using a prohibited steroid, IAAF expert Dr. Donike had the following to say on behalf of the accused athlete:

> In the case of the B-analysis of Sandra Gasser on 23 September 1987, the presence of the metabolite of methyltestosterone could be confirmed but the steroid profile was so different that the only logical conclusion was that the urines in the A- and B-sample were not identical.
>
> The laboratory could not give an explanation of this result on the 23 September 1987 in the presence of representatives of the Swiss Federation and of IAAF, *so the files on this case should have been closed at this stage* as the result of the B-analysis did not correspond in all necessary details with the result of the A-analysis.

Pl's Ex. 62 (emphasis added). He concluded that it was his "firm opinion" that a "dope control procedure can only be defended when it has been performed without mistakes and errors." *Id.*

> . . . *If the Doping Commission believes that a prohibited substance has been detected* in the main "A" sample and that the reserve "B" sample confirms the presence of the prohibited substance detected in the main "A" sample, the test shall be regarded as positive and the athlete shall be suspended at this time.

IAAF Guidelines ¶¶ 7.2, 7.3 (emphasis added); IAAF Hr'g Tr. at 82.

Here, despite the fact that the IAAF's own rules provide that an athlete may only be suspended if the *Commission* determines that a prohibited substance has been detected, the evidence is conclusive that the Doping Commission did not receive or review the results of the tests conducted by the LaFarge Laboratory prior to Plaintiff's suspension. TAC Hr'g Tr. at 414; IAAF Hr'g Tr. at 82-83. Indeed a Doping Control Officer of the IAAF has admitted that the Doping Commission did not even discuss the LaFarge Laboratory data until November of 1991, over a year after Plaintiff had been suspended. IAAF Hr'g Tr. at 94-96; IAAF Hr'g Tr., Part 2, at 40-42.

Given the immensely devastating consequences of a positive finding for a prohibited substance, it is utterly incomprehensible that the IAAF Doping Commission failed to review the test results as required by its own rules, failed to require or retain proper chain of custody documentation, and failed to require that Reynolds' purported "B" sample confirm his "A" sample. All of these failures are in plain breach of the IAAF's contract with Mr. Reynolds, and compel the conclusion that Plaintiff has established the liability of the IAAF.

B. Contractual Due Process

Ohio's courts have consistently held that where a private association disciplines an individual in a manner that adversely affects that individual's livelihood, the as-

sociation must follow its own rules and regulations and must provide a hearing that comports with fundamental due process. *See Bay v. Anderson Hills, Inc.*, 19 Ohio App. 3d 136, 483 N.E.2d 491 (1984); *Barrett v. Ohio High School Athletic Assoc.*, No. 75AP-24 (Ohio Ct. App., Franklin County, Feb. 11, 1975). *See also Professional Sports, Ltd. v. Virginia Squires Basketball Club Limited Partnership*, 373 F. Supp. 946 (W.D. Tex. 1974); *California State Univ. v. NCAA*, 47 Cal. App. 3d 533, 121 Cal. Rptr. 85 (1975); *McCune v. Wilson*, 237 So. 2d 169 (Fla. 1970); *Levy v. Amateur Skating Union*, 288 N.Y.S. 2d 300, 56 Misc. 2d 257 (1968). Indeed, judicial intervention is most necessary where the association maintains a monopoly over the particular activity in question:

> The Court, however, must not ignore the power that monopolistic private associations exercise over their members. As has been observed by one commentator, "Since the leaders of groups which have an economic stranglehold are relatively free from control by membership withdrawal, it would seem more important that other controls, such as judicial intervention, be available. . . The group, then, may not be allowed to appeal solely to its own goals as justification, but may have to justify its practices in the light of broader social interests."

McCreery Angus Farms v. American Angus Ass'n, 379 F. Supp. 1008, 1019, (S.D. Ill.), *aff'd without op.*, 506 F.2d 1404 (7th Cir. 1974) (quoting Chafee, *The Internal Affairs of Associations Not for Profit*, 43 Harv. L. Rev. 993 (1930)).

In determining whether the IAAF has deprived Plaintiff of his right to contractual due process, this Court will consider the following factors:

> (1) whether, in the first instance, the association abided by its own rules and regulations with respect to the disciplinary action taken;

(2) whether the disciplinary decision is malicious or made in bad faith;

(3) whether the decision itself is arbitrary and capricious;

(4) whether the person affected has been given a full and fair opportunity to participate in the hearing, including the opportunity to hear the evidence against him and the opportunity to present evidence in favor of his position;

(5) whether the hearing was conducted in good faith before an unbiased decisionmaker; and

(6) whether the decision was fair and impartial.

See Barrett v. Ohio High School Athletic Assoc., No. 75AP-24 (Ohio Ct. App., Franklin County, Feb. 11, 1975); *Milkie v. Academy of Medicine*, 18 Ohio App. 2d 44, 246 N.E.2d 598 (1969).

The evidence presented by Reynolds at the hearing on October 20 conclusively establishes that the IAAF deprived him of his right to contractual due process. Indeed, it is this Court's conclusion that the IAAF hearing was not conducted in good faith, was not conducted by an unbiased decisionmaker, was not in accordance with the IAAF's own rules and regulations, did not accord Mr. Reynolds a full and fair opportunity to participate, and resulted in a decision that was not fair and impartial but rather was arbitrary and capricious. *See generally* Tr. at 137-146. Some of the most egregious facts which compel this conclusion are as follows:

1. *The IAAF's failure to provide Plaintiff with critical documents*

As Plaintiff's expert Robert Duncan, a former federal district court judge, noted, under IAAF rules, once a positive test is reported, the athlete is presumed guilty and therefore has the burden to establish his innocence. The only means by which an athlete can do so is by having

access to the evidence of guilt, i.e., the body of scientific data which allegedly demonstrates the use of a prohibited substance. Tr. at 141. Indeed, IOC/IAAF protocols adopted by the IAAF in 1978 impliedly acknowledge this in that they mandate the retention of all scientific and chain of custody documents for at least two years—and five years if there is a legal challenge. Tr. at 142. *See also* Tr. at 20 (testimony of Dr. Black).

In violation of its own rules and traditional notions of due process, the evidence establishes that Defendant IAAF has refused to provide Reynolds with several categories of documents critical to his defense. First, approximately 70% of the scientific and chain of custody documents have not been provided to Reynolds. With respect to this "suppression" of documentation, Duncan testified that:

> So it does seem to me that after repeated requests, the failure to turn over such documents or otherwise account for them in any reasonable way suggests to me that the ability of Mr. Reynolds to present any evidence and satisfy his burden went away with the suppression [or] the refusal to turn over what documents, if any, existed.

Tr. at 143.

Similarly, the evidence establishes that the IAAF has refused to provide Reynolds the records of the International Olympic Committee investigation of the LaFarge Laboratory with respect to the laboratory's consistent inability to identify and quantify testosterone accurately in testing. TAC Hr'g Tr. at 414-421. Mr. Duncan testified that such information is "extremely important." Tr. at 143.

2. *The IAAF's refusal to consider all relevant evidence*

The evidence before the Court establishes that the IAAF hearing panel refused to consider all relevant evi-

dence. Dr. Black testified that the panel specifically did not consider (1) the discrepancy of the T/E ratios between the "A" and "B" samples attributed to Plaintiff, (2) the disparate results of the August 12 and August 19 samples,[15] and (3) evidence regarding the *Gasser* case. Furthermore, it is fairly likely that the IAAF Panel relied upon the TAC transcript but that it did not have the exhibits from the TAC hearing, rendering it impossible for the panel to understand and appreciate the significance of the testimony presented at the TAC hearing. Tr. at 52-60, 139-46, 157-58.

3. *The IAAF's motivation was not to seek the truth*

The evidence before the Court establishes that the IAAF's goal throughout these proceedings was—and remains—solely to protect its reputation and that of the LaFarge Laboratory. *See* Tr. at 134-35; *see also* Pl's Exs. 59, 60. Presumably, the IAAF believes that if it were to admit an error occurred with respect to Mr. Reynolds' drug test, it will be faced with challenges from every other athlete against whom it levels a doping charge. Thus, the IAAF's position toward Reynolds has always been that any challenge to its suspension will ultimately be futile, and the evidence suggests that it takes this position with respect to other athletes. Tr. at 154.

For all of these reasons, the Court concludes that the process accorded to Reynolds did not comport with the dictates of due process as required by the contractual relationship between the IAAF and the world's track and field athletes.

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[15] As was noted by the Court in its June 19, 1992 Opinion and Order, Reynolds tested negative for nandrolone on August 19, 1990—only one week after the IAAF alleges he tested positive for nandrolone in Monaco. Dr. Black testified that because nandrolone is known to remain in the blood for a substantial amount of time, there is no reasonable scientific explanation for this result. Prelim. Inj. Tr. at 126-130.

C. Defamation

In Ohio, defamation is defined as a "false publication which injures a person's reputation." *Cleveland Leader Printing Co. v. Nethersole*, 84 Ohio St. 118, 95 N.E. 735 (1911); *Dale v. Ohio Civil Service Employees' Ass'n*, 57 Ohio St.3d 112, 117, 567 N.E.2d 253, 258, *cert. denied*, 59 U.S.L.W. 3849 (1991). Plaintiff must show the false and defamatory nature of the defendant's statements by clear and convincing evidence. *Id.; Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St. 3d 176, 178-80, 512 N.E.2d 979, 984 (1987). Additionally, a public figure such as Mr. Reynolds must show by clear and convincing evidence that the challenged statement was published with "actual malice." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989). "Actual malice" requires that the defendant published the statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (quoted in *Varanese v. Gall*, 35 Ohio St. 3d 78, 80, *cert. denied*, 487 U.S. 1206 (1988)).

Actual malice premised on recklessness "may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Harte-Hanks*, 491 U.S. at 688 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)). Moreover, the United States Supreme Court has recently held that failure to investigate the truth or falsity of defamatory statements may rise to the level of actual malice where such failure "involved a deliberate effort to avoid the truth." *Id.* at 685. The Supreme Court in *Harte-Hanks* affirmed a Sixth Circuit finding of actual malice in a case where the defendant had disregarded clear indications that its reports were untrue. The Court said:

> [I]t is likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable

> falsity of Thompson's charges. Although failure to investigate will not alone support a finding of actual malice, see St. Amant, 390 U.S., at 731, 733 . . . , *the purposeful avoidance of truth is another story.*

Id. at 692.

The evidence before the Court clearly establishes a substantial likelihood that the IAAF's report of Reynolds' drug use was not only false, but that it was disseminated with malice. From the beginning, the IAAF has completely avoided the enormous body of scientific and testimonial evidence which establishes a substantial doubt as to the reliability of the tests performed on Reynolds' urine sample. Indeed, the record in this case establishes that the IAAF has *purposefully avoided the truth*, if for no other reason than its desire to protect the credibility of its drug testing facilities at the personal expense of Mr. Reynolds. From the fact that the IAAF reported Reynolds' test results prior to a review hearing, Pl's Exs. 28, 29, to the fact that it has refused to consider the overwhelming body of scientific evidence tending to disprove its own positive test results and has stated through its leaders that Reynolds will *never* prevail on his claims, this Court concludes that the IAFF has defamed Reynolds to his detriment, and that it has done so with malice.

D. Tortious Interference with Business Relations

In Ohio, "the tort of business interference occurs when a person, without a privilege, induces or otherwise purposely causes a third party not to enter into, or continue, a business relationship, or perform a contract with another." *Heheman v. E.W. Scripps Co.*, 661 F.2d 1115, 1127 (6th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982) (quoting *Juhasz v. Quik Shops, Inc.*, 55 Ohio App. 2d 51 syllabus ¶ 2 (1977)). To establish liability, the plaintiff need not prove any particular contract was breached; he need only show "there was an interference by [the defendant] that in some way affected the business relationship"

between plaintiff and a third party. *Dougherty v. Parsec, Inc.*, 872 F.2d 766, 770 (6th Cir. 1989). In determining whether or not a particular defendant's conduct is privileged, this Court must consider "(a) the nature of the actor's conduct; (b) the nature of the expectancy with which his conduct interferes; (c) the relation between the parties; (d) the interest sought to be advanced by the actor; and (e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand." *Heheman*, 661 F.2d at 1127. While the defendant's "malicious intent" need not be proved as an element of the plaintiff's case, it is a factor to be considered. *Id.*

In this case, the evidence establishes that the IAAF has interfered with Reynolds' business relationships, and that its conduct in so doing was not privileged. In summary form, the evidence presented to this Court establishes the following:

1. Despite the fact that it knew that the release of Reynolds' test results would cause third parties to void existing contracts and prevent others from entering into endorsement contracts, the IAAF maliciously released information regarding the alleged positive test. Pl's Exs. 28, 29.

2. The IAAF's public allegations against Mr. Reynolds resulted in the cancellation of his existing endorsement contracts and caused such interest in him to disappear generally. Tr. at 132.

3. The IAAF's actions prior to and during the United States Olympic Trials prevented Reynolds from performing to the best of his ability. Tr. at 72-82.

4. The IAAF, in direct defiance of this Court's preliminary injunction, prevented Reynolds from participating in the Olympic Games in Barcelona. Tr. at 81-83.

5. The IAAF maliciously extended Reynolds' suspension as a result of his efforts to challenge the IAAF's laboratory results. Tr. at 85-86.

As a result of the foregoing conduct on the part of the IAAF, the Plaintiff has been prevented from competing and earning his livelihood, and has been denied the opportunity to rehabilitate his worldwide reputation. Furthermore, this Court can identify no reason why the IAAF's conduct should be considered privileged. Therefore, it is the conclusion of the Court that Plaintiff has established all of the elements of this claim, as he has established all of the elements of every other asserted claim, and that he must therefore be awarded appropriate relief.

V.

EQUITABLE RELIEF

This Court previously entered a preliminary injunction precluding the IAAF and TAC from interfering in any manner with Reynolds' ability to compete. The record in this case clearly illustrates the extent to which the IAAF has gone to prevent Reynolds from competing in national and international competition. Indeed, in direct contravention of this Court's previous injunction, the IAAF has extended Reynold's suspension until the end of 1992 so that, even now, he may not compete. Thus, it is this Court's belief that Reynolds continues to be harmed by the actions of the IAAF and that he is therefore entitled to a permanent injunction preventing the IAAF from continuing to interfere with his ability to compete in national and international track and field competition.

VI.

COMPENSATORY AND PUNITIVE DAMAGES

Having established that the IAAF is liable to Reynolds on each of his claims, it remains for the Court to determine the amount that the IAAF must pay to Reynolds to

compensate him for the harm that he has suffered. The testimony at the October 20 hearing establishes that Reynolds has already been harmed in terms of canceled endorsement contracts and lost appearance fees, and that he will continue to suffer severe financial losses in the future because of his tarnished reputation.

While damages in a case such as this are not amenable to exact calculation, the Court believes that the Plaintiff has established by a preponderance of the evidence that he is entitled to $6,839,002 in compensatory damages. In reaching this conclusion, the Court makes the following findings:

1. Prior to his suspension, Plaintiff was considered one of the premier world-class track and field athletes. Tr. at 150-51.

2. Prior to his suspension, Plaintiff had entered into several lucrative endorsement contracts with companies such as Nike, Kroger, Ross Laboratories, and Firestone, and reasonably anticipated entering into an additional contract with the United States Postal Service and at least one other company per year during his career. Tr. at 129-31; Pl's Ex. 70.

3. Prior to his suspension, Plaintiff earned the following in appearance fees and endorsement contracts:

1987:	$56,000
1988:	$255,112
1989:	$316,915
1990:	$333,375

See Pl's Exs. 66, 67, 68, 69; Tr. at 87-92.

4. Plaintiff was likely to win a gold medal in the 1992 Olympic Games. Tr. at 155, 115-16.

5. Plaintiff's ability to perform at the United States Olympic Trials was hampered by the actions of TAC

and the IAAF, including but not limited to, their appeal of this Court's issuance of the preliminary injunction and their threat of an additional four year suspension if Reynolds competed in the Trials. Tr. at 74, 80.

6. TAC and the IAAF have wrongfully kept Plaintiff out of competition for over two years, and have wrongfully impeded his ability to earn money after his suspension is lifted.

7. All of Plaintiff's endorsement contracts have been terminated as a result of the IAAF suspension. Tr. at 132.

8. Reynolds' earning capacity in the post-suspension period is likely to be approximately 30% of what it would have been absent the suspension. Tr. at 116-17.

9. Reynolds' earning capacity as an athlete is likely to continue at least until the year 2001. Pl's Ex. 70; Tr. at 106-31.

10. Beginning at the moment of his suspension and continuing through the year 2001, Plaintiff has and will continue to be damaged in the amount of $9,149,303. The present value of this figure as of January, 1993 is $6,839,002.[16] Pl's Ex. 70; Tr. at 95-133.

Thus, this Court will award Plaintiff $6,839,002 in compensation for the damages he has and will continue to suffer as a result of the IAAF's conduct.

Additionally, the Court believes that Mr. Reynolds is entitled to an award of punitive damages. In Ohio, punitive damages are favored to "punish[] the offending party and set[] him up as an example to others that they might

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[16] This figure has been discounted by 30% to reflect the income that Mr. Reynolds is expected to earn beginning in January, 1993.

be deterred from similar conduct." *Preston v. Murty*, 32 Ohio St. 3d 334, 335, 512 N.E.2d 1174, 1176 (1987) (quoting *Detling v. Chockley*, 70 Ohio St. 2d 134, 136 (1982)). Such damages are proper where the defendant has acted with malice, *Villella v. Waikem Motors Inc.*, 45 Ohio St. 3d 36, 37, 543 N.E.2d 464, 466 (1989), which is defined as (1) conduct by the defendant which is characterized by hatred, ill will or a spirit of revenge, or (2) actions on the part of the defendant which demonstrate a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *Id.* (quoting *Preston v. Murty*, 32 Ohio St. 3d 334, syllabus ¶ 1 (1987)).

Here, the Defendant's conduct establishes that it acted with ill will and a spirit of revenge toward Mr. Reynolds. In its post-hearing memorandum, the Plaintiff presented an exhaustive accounting of the IAAF's specific acts which support an inference of malice, and this Court will not recount such facts in their entirety. Suffice it to say, the suppression of evidence, the misrepresentations as to the availability of relevant evidence, the threats levied against Reynolds and his fellow athletes, and the extension of Reynolds' suspension for an additional four months, all lead to the inescapable conclusion that the IAAF has acted in spite and with a conscious disregard for Reynolds' rights. In such a case, an award of treble damages in the amount of $20,517,006 is appropriate.

WHEREUPON, upon consideration and being duly advised, the Court finds that it has jurisdiction over both the subject matter of this lawsuit and the parties, and that the Plaintiff has established by a preponderance of the evidence all of the elements of his claims. Furthermore, the Court finds Plaintiff's motion for the entry of default judgment to be meritorious, and it is, therefore, GRANTED. The Clerk is directed to enter Judgment in favor of the Plaintiff in the amount of $6,839,002 in compensatory damages and $20,517,006 in punitive damages,

for a total Judgment of $27,356,008. Finally, because the Court finds that in the absence of a permanent injunction the Plaintiff will be irreparably harmed and that the harm suffered by Plaintiff outweighs any harm others may suffer, it is hereby ORDERED and DECREED that:

(1) Plaintiff's Motion for a Permanent Injunction is granted:

(2) Defendants, the IAAF and TAC, their agents, members, officers, attorneys, servants, employees, and any and all other persons who act in concert or participation with Defendants or who act upon the order or direction of Defendants or in place of Defendants who receive actual notice of this Order are hereby permanently restrained and enjoined from interfering, impeding, threatening to impede or interfere, in any way with Plaintiff's ability to compete in all international and national amateur track and field competitions, as a result of or in any manner connected with tests on any sample of urine attributed to him from the August 12, 1990 Herculis '90 International Track and Field Meet in Monte Carlo, Monaco;

(3) Defendants, the IAAF and TAC, their agents, members, officers, attorneys, servants, employees, and any and all other persons who act in concert or participation with Defendants or who act upon the order or direction of Defendants or in place of Defendants who receive actual notice of this Order are hereby permanently restrained and enjoined from threatening to suspend, declare ineligible or contaminate, and from suspending, or declaring ineligible or contaminating, any athlete who competes with Plaintiff in any international or national track and field competition;

(4) Defendants, the IAAF and TAC, their agents, members, officers, attorneys, servants, employees, and any and all other persons who act in concert or participation with Defendants or who act upon the order or direction of Defendants or in place of Defendants who receive actual notice of this Order are hereby permanently restrained and enjoined from suspending Plaintiff or declaring him ineligible as a result of Plaintiff's participation in any track and field competition in which Plaintiff participated pursuant to any of this Court's Temporary or Preliminary Injunction Orders;

(5) Defendants, the IAAF and TAC, their agents, members, officers, attorneys, servants, employees, and any and all other persons who act in concert or participation with Defendants or who act upon the order or direction of Defendants or in place of Defendants who receive actual notice of this Order are hereby permamently restrained and enjoined from suspending or declaring ineligible any other athlete who participated or competed with Plaintiff in national or international track and field competition pursuant to any of this Court's Temporary or Preliminary Injunction Orders;

(6) Defendants, the IAAF and TAC, their agents, members, officers, attorneys, servants, employees, and any and all other persons who act in concert or participation with Defendants or who act upon the order or direction of Defendants or in place of Defendants who receive actual notice of this Order are hereby permanently restrained and enjoined from threatening to suspend Plaintiff or declare him ineligible and from suspending or declaring him ineligible as

a result of his prosecution of or participation in this action, including actions taken by Plaintiff to execute upon the judgment of this Court;

(7) Defendants, the IAAF and TAC, their agents, members, officers, attorneys, servants, employees, and any and all other persons who act in concert or participation with Defendants or who act upon the order or direction of Defendants or in place of Defendants are hereby permanently restrained and enjoined from acting, either directly or indirectly, in any manner to dissuade, discourage, influence, intimidate or preclude any party from extending to Plaintiff an invitation to compete in any international or national amateur track and field competition.

Plaintiff's bond in the amount of $100.00 posted in connection with the Temporary Restraining Order shall be returned to him. In accordance with S.D. Ohio Local Rule 54.2, Plaintiff may file an Application for Attorneys Fees within 30 days after the entry of Judgment.

IT IS SO ORDERED.

/s/ Joseph Kinneary
United States District Judge

APPENDIX E

[Filed Jun. 19, 1992]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-92-452

HARRY L. REYNOLDS, JR.,
Plaintiff,

v.

INTERNATIONAL AMATEUR ATHLETIC FEDERATION, *et al.*,
Defendants.

OPINION AND ORDER

This matter comes before the Court to consider the application of the Plaintiff, Harry L. Reynolds, Jr. to convert the Temporary Restraining Order issued on May 28, 1992, and extended on June 8, 1992, into a preliminary injunction. The International Amateur Athletic Federation ("IAAF") has refused to participate in this action, and it has informed Reynolds by letter that its refusal to appear is based upon its belief that this Court lacks personal jurisdiction over it. Notwithstanding the IAAF's absence, this Court conducted an evidentiary hearing on June 17, 1992 to determine whether a preliminary injunction should issue. At the hearing, this Court granted the motion of The Athletics Congress of the U.S.A., Inc. ["TAC"] and three track and field athletes eligible to participate in the United States Olympic trials [1] to inter-

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[1] Those athletes are Steve Lewis, Danny Everett, and Antonio Pettigrew.

vene as Defendants in this action, and also allowed the United States Olympic Committee to appear as *amicus curiae*.

FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiff, Harry L. Reynolds, Jr. is a world-class amateur track athlete. He is the current world record holder at the 400 meter distance, and won the silver medal at that distance in the 1988 Olympic games in Seoul, Korea.

This action arises out of Reynolds' appearance in the Herculis '90 International track and field competition ("the Herculis meet") in Monte Carlo, Monaco on August 12, 1990. Following the meet, Reynolds was randomly chosen to submit a urine sample, and on October 18, 1990 he was notified that the sample had tested positive for the anabolic steroid nandrolone. The IAAF immediately suspended Reynolds pending a hearing by Reynolds' national track and field governing body, TAC.[2]

Rather than seek a hearing from TAC, Reynolds sought the intervention of this Court in a case styled *Reynolds v.*

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[2] Conflicting evidence was presented at the hearing with respect to whether Reynolds was "suspended" or declared "ineligible" immediately following the Monte Carlo meet. According to IAAF Rule 59, disciplinary proceedings must occur in three stages: suspension, hearing, and ineligibility. Frank Greenberg, the President of TAC, testified that while an athlete may not participate in track and field events from the moment of suspension, it is only after a hearing and a declaration of ineligibility that the so-called contamination rule, IAAF Rule 53(ii), becomes applicable.

According to Greenberg, Reynolds was merely suspended by the IAAF immediately upon its receipt of the positive test results from the Monte Carlo meet. However, in a letter from a Doping Control Officer of the IAAF to the Executive Director of TAC, it is declared that "Harry Reynolds is, therefore, *ineligible* to compete under IAAF Rules for a period of 2 years from the date the sample was provided." Pl's Ex. 25 (emphasis added). The Court can only conclude that the IAAF does not exhibit strict adherence to its own rules.

The Athletics Congress of the U.S.A., Inc., et al., No. C-2-91-003 (S.D. Ohio 1991) (Kinneary, J.) ("Reynolds I") which was before the Court in early 1991. The Complaint in Reynolds I averred that Plaintiff Reynolds was a world-class track and field athlete falsely accused by the IAAF of steroid use and wrongfully suspended from competition for two years—August 12, 1990 to August 11, 1992. On March 19, 1991, this Court held that Reynolds failed to exhaust his administrative remedies and stayed the action pending such exhaustion. On June 11, 1991 the Sixth Circuit Court of Appeals vacated the judgment and ordered the entire case dismissed on the grounds that exhaustion of administrative remedies is a precondition to the exercise of subject matter jurisdiction.[3]

Plaintiff then attempted to exhaust the administrative process available to him. Pursuant to the Amateur Sports Act of 1978, 38 U.S.C. §§ 371-96, and the United States Olympic Committee (USOC) Constitution, Reynolds first participated in an expedited American Arbitration Association proceeding on June 7, 1991. On June 10, 1991, the arbitrator issued a decision essentially exonerating Reynolds on the charge of steroid use:

> The arbitrator finds that the Respondent's suspension of Mr. Reynolds was improper; that there is clear and convincing evidence that the "A" sample and the "B" sample did not emanate from the same person and the "B" sample did not confirm the "A" sample; that there is substantial evidence that neither the "A" sample or the "B" sample emanated from the Claimant; and that Claimant should be declared eligible to compete in the qualifying rounds for the World Game Championships on June 12, 1991.

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[3] The Defendant in the current action, IAAF, specially appeared in Reynolds I and moved to have the claims against it dismissed for lack of personal jurisdiction. This Court never had occasion to consider the issue.

Complaint Ex. G, Findings and Award of Arbitrator, at 3.

Both TAC and the IAAF refused to accept the arbitrator's decision for the alleged reason that such proceedings are inconsistent with the IAAF's post-suspension administrative adjudication process as provided in IAAF Rule 59. Reynolds' request to the USOC to enforce the decision was denied.

TAC, as the organization required by the IAAF to provide post-suspension administrative adjudication of any dispute, eventually scheduled a hearing for September 13, 1991. After a 12-hour hearing and two weeks of deliberation, the TAC hearing panel announced its decision exonerating Reynolds:

> The panel, after hearing the matters before it, the testimony of witnesses and expert witnesses from both sides, documents and exhibits, hereby finds that Mr. Harry "Butch" Reynolds has cast substantial doubt on the validity of the drug test attributed to him. The panel finds that the "B" sample positive result reported by the Lafarge Laboratory has been impeached by clear and convincing evidence.

Pl's Ex. 20.

The IAAF, however, refused to accepts TAC's finding. Pursuant to its own Rule 20—which provides for the arbitration of disputes between itself and its member associations—the IAAF ordered, on November 17, 1991, an arbitration of the TAC hearing decision. On May 10 and 11, 1992, the IAAF and TAC presented their positions to a three-member arbitration panel. After only two hours of deliberation, the panel issued a seven page decision finding there to be "no doubt" as to Reynolds' guilt.

On May 27, 1992, Reynolds returned to this Court and filed a Verified Complaint along with an application for emergency injunctive relief. The Complaint, which differs from that filed in Reynolds I in that it only names the

IAAF as a Defendant, states claims for breach of contract, defamation, tortious interference with a business relationship, and denial of contractual due process.

The next morning this Court held an informal preliminary conference to discuss the possible issuance of a temporary restraining order against the IAAF. Although an official representative of the IAAF was not present, counsel for the IAAF in Reynolds I was notified of the conference and did appear to make arguments on the IAAF's behalf, although she expressly informed the Court that she had been unable to contact the IAAF and had not yet been retained to represent the IAAF in the current action. As this Court has already noted, the IAAF thereafter decided not to retain counsel to represent it in this action, and has not made an appearance.

Finding the Plaintiff's application for a temporary restraining order to be meritorious, the Court on May 28, 1992 "restrained and enjoined [the IAAF] from impeding or otherwise interfering with Plaintiff Harry L. Reynolds, Jr.'s participation in all international and national amateur track and field events as a result of or in any manner connected with tests of any sample of urine attributed to him from the August 12, 1990 Herculis '90 International track and field meet in Monte Carlo, Monaco." On June 8, 1992, this Court extended the effect of the restraining order until June 18, 1992. According to Federal Rule of Civil Procedure 65, the temporary restraining order must either be converted into a preliminary injunction or dissolved. Before this Court can consider the merits of a preliminary injunction, however, it must decide whether it may exercise personal jurisdiction over the IAAF.

I. PERSONAL JURISDICTION OF THIS COURT OVER THE IAAF [4]

The burden of establishing jurisdiction is on the plaintiff. *Weller v. Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974). However, if the district court determines to decide the issue solely on the basis of written materials, the plaintiff need only make a prima facie case of jurisdiction. *Welsh v. Gibbs*, 631 F.2d 436, 438 (6th Cir. 1980). This is satisfied where the plaintiff "demonstrate[s] facts which support a finding of jurisdiction in order to avoid a motion to dismiss." *Welsh*, 631 F.2d at 438 (quoting *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977) (citation omitted)). Under such circumstances, "the burden on the plaintiff is relatively slight, and the district court 'must consider the pleadings and affidavits in the light most favorable to the plaintiff.'" *Welsh*, 631 F.2d at 439 (quoting *Poston v. American President Lines, Ltd.*, 452 F. Supp. 568, 571 (S.D. Fla. 1978) (citation omitted)).

For personal jurisdiction to exist over a nonresident defendant in a diversity case, the central concern is the relationship among the defendant, the forum, and the litigation. When presented with a jurisdictional dispute concerning the sufficiency of the defendant's contacts with the forum state, a district court must apply the law of the state in which it sits, subject to constitutional limitations. *Welsh*, 631 F.2d at 439. Thus, two basic prerequisites must be satisfied: the defendant must be amenable to suit under the forum state's long-arm statute and the exercise of jurisdiction over the defendant must not violate the Due Process Clause of the United States Constitution. *In-*

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[4] To the extent the allegations in the Complaint and Plaintiff's brief regarding personal jurisdiction are uncontroverted, they must be taken as true. *Behagen v. Amateur Basketball Ass'n*, 744 F.2d 731, 733 (10th Cir. 1984).

Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 224 (6th Cir. 1972).

With respect to a defendant's amenability to suit in Ohio, the Ohio Revised Code provides:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
>
> (1) Transacting any business in this state;
>
> * * *
>
> (3) Causing tortious injury by an act or omission in this state;
>
> (4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
>
> * * *
>
> (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;
>
> * * *
>
> (C) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

O.R.C. § 2307.382. In Ohio, the long-arm statute has been construed to extend the jurisdiction of Ohio's courts to the constitutional limits. *In-Flight Devices*, 466 F.2d at 224-25; *Didactics Corp. v. Welch Scientific Co.*, 291 F. Supp. 890 (N.D. Ohio 1968).

With respect to the "transacting business" provision of the Ohio long-arm statute, subsection (a)(1), the Plaintiff alleges the following jurisdictional facts:

1. "[T]he IAAF makes eligibility determinations regarding athletes and such determinations dramatically affect not only Plaintiff's ability to participate as an 'amateur' athlete, but also his livelihood." Pl's Brief at 19.

2. "The IAAF has controlled Plaintiff's ability to participate in competitions, to seek endorsements, to select an agent, and even to withdraw his own earnings from a trust fund." *Id.*

3. "While controlling athletes, the IAAF, like any sports organization, [] relies on athletes to generate income. The IAAF [] sponsors a series of championship events which are known as the IAAF World Series and its Own Grand Prix circuit. . . The IAAF pays for the athletes to attend these events . . ." *Id.*

4. "[T]he IAAF contributed to Plaintiff's expenses to insure his participation in the 1987 World Championships and the 1989 IAAF/Mobil Grand Prix Championships." *Id.* at 20.

5. "The IAAF [] receives substantial income from television broadcasts of its track and field events including those in which Plaintiff participated." *Id.*

6. "The IAAF [] markets books and pamphlets in Ohio by various means, including publication of advertisements in magazines of national circulation, such as Track and Field News." *Id.*

7. "The IAAF also transacted business with Plaintiff through its agent, TAC, and thus jurisdiction exists on that basis as well. . . . [T]he IAAF, as the international governing body for track and field, operates through its members including TAC. As a member, TAC must abide by all IAAF rules and

> enforce those rules against its own athlete members, to the extent it is authorized to do so by United States law. Of significance in this case is the IAAF's delegation to TAC the duties of notifying Plaintiff that the IAAF suspended him for a purported doping violation, of conducting a hearing, and of investigating the matter further." *Id.* at 22.

In construing the nearly identical Michigan long-arm provision, the Sixth Circuit declared that the use of the word "any" in the phrase "transaction of any business within the state" means just what it says: "It includes 'each' and 'every' . . . . It comprehends the 'slightest.'" *Lanier v. American Bd. of Endodontics*, 843 F.2d 901, 906 (6th Cir. 1988). In *Lanier*, the Sixth Circuit considered whether the district court could exercise personal jurisdiction over the defendant Board of Endodontics pursuant to the "transaction of any business" provision of Michigan's long-arm statute. In concluding that the court could indeed exercise jurisdiction, the appellate court stated:

> The point is that the exchange of correspondence and telephone calls between them including particularly the defendants' activity in mailing the application for Board certification to Dr. Lanier in Michigan, advising her by mail of the requirements for board certification, accepting by mail from Michigan the required registration fees, advising Dr. Lanier of the time, date, and location of the written and oral examinations, sending letters to Michigan advising her that she had been rejected and inviting her to sit for a second oral examination, amounted collectively to the transaction of "any" business in Michigan.

Indeed, the court even conceded that "[t]he Board's contacts in Michigan, insofar as they are pertinent to this case, related entirely to the process of considering Dr. Lanier's request for certification . . ." *Id.* at 906.

The Court concludes that the Plaintiff has made a prima facie showing that the Defendant IAAF "transacts" business in Ohio. The IAAF makes eligibility determinations with respect to Ohio athletes—including Mr. Reynolds. It arguably enters into a contractual relationship with those athletes—and as averred in the Complaint and presently stands uncontradicted before this Court—it has breached that contract with respect to Mr. Reynolds, causing him significant financial loss. This loss apparently includes the loss of endorsement fees from Ohio corporations. Furthermore, not only does Reynolds receive money from the IAAF to travel from his home in Ohio to IAAF track and field events, the IAAF also receives substantial monies from the broadcast of its meets. Given these, and the other contacts listed above, the Court finds that the IAAF is amenable to suit in Ohio pursuant to the Ohio long-arm statute.

With respect to the "tortious activity in Ohio" provision of the long-arm statute, the Plaintiff alleges the following jurisdictional facts:

> 1. "In his complaint, Plaintiff has alleged that the IAAF defamed him when it falsely announced to the press world wide that Plaintiff used nandrolone. . . . The defamatory material, the false allegation that Plaintiff used nandrolone, was published in Ohio. The IAAF has issued news releases in Europe through the IAAF Medical Committee Chair, Dr. Arne Ljungqvist, which was carried by Ohio periodicals, including those in Columbus. It was also carried by periodicals such as the New York Times, which are circulated in Ohio." Pl's Brief at 27.
>
> 2. "The IAAF is also amenable to suit because it tortiously interfered with Plaintiff's business relationships. . . . In the case at bar, as a result of the false accusation and Defendant's improper suspension, Plaintiff lost substantial revenues because NIKE terminated an endorsement contract with Plaintiff

> and declined to proceed with production of a television commercial utilizing Plaintiff. A substantial number of other opportunities for endorsement contracts which were reasonably anticipated to yield significant revenues for Plaintiff were lost because of the suspension. Many of these contracts involved Ohio companies." *Id.* at 27-28.

Again, the Court concludes that the IAAF is amenable to suit in Ohio based upon the tortious activity provisions of the Ohio long-arm statute. The uncontroverted allegations of defamation and interference with business relationships both make out a prima facie case that the IAAF has committed a tortious act which has injured an Ohio resident, and it must reasonably have been expected to do so.[5] Given the uncontroverted nature of the alleged tortious activity and its effect on Mr. Reynolds, the Court finds that the IAAF is amenable to suit in Ohio under Ohio's long-arm statute.

Aside from determining whether the IAAF is amenable to suit in Ohio pursuant to the Ohio long-arm statute, this Court must also determine whether the exercise of jurisdiction over the IAAF comports with the dictates of Due Process:

> Due Process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

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[5] Indeed, the fact that the IAAF and TAC label their doping-related correspondence "CONFIDENTIAL" evidences their understanding that allegations of drug use will cause serious injury to the reputation of an athlete. Evidence at the hearing, however, suggests that the IAAF published to the world press its conclusion that Reynolds had ingested nandrolone before he was accorded a hearing as provided in the IAAF's own rules.

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). In determining whether this standard has been satisfied, this Court is guided by a three-part test adopted by the Sixth Circuit: (1) whether the defendant purposely availed itself of the privilege of acting in the forum state or causing a consequence in the forum state; (2) whether the cause of action arose from the defendant's activities in the forum state; and (3) whether the defendant's actions or the consequences of its actions had a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable. *See, e.g., Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968); *In-Flight Devices*, 466 F.2d at 226. This test is not to be mechanically applied, and it does not "eliminate the need to consider the jurisdictional facts of each case individually, to make judgments as to the substantiality of contacts with the forum state and the fairness and justice of subjecting a specific defendant to the in personam jurisdiction of the forum state." *In-Flight*, 466 F.2d at 225-26. Rather, "[i]t is imperative that it be understood that the flexibility, and therein the virtue, of the *International Shoe* test is retained in the third condition and no mechanical consideration of the first two elements of the test can eliminate the need for an appraisal of the overall circumstances of each case if jurisdiction is to be found." *Id.* at 226.

The Court believes that it may constitutionally exercise personal jurisdiction over the IAAF. Initially, the Court must sharply reject the IAAF and TAC's position that the IAAF is not subject to the jurisdiction of *any* court *anywhere* in the world. At the hearing, TAC's counsel expressed the view that the IAAF is "infallible" and its decisions must not be reviewable by this Court—or any other. Indeed, IAAF vice president Arne Ljungqvist has been quoted as stating:

> Civil courts create a lot of problems for our anti-doping work, but we have said we don't care in the

> least what they say. We have our rules, and they are supreme . . .

Pl's Brief Regarding Personal Jurisdiction of the IAAF, Ex. Y. Apparently, the IAAF takes the position that to accord athletes the individual rights which the United States has always accorded its own citizens is inconsistent with the rules of the IAAF. In a letter from the President of the IAAF to the President of TAC, the former stated:

> I realize that you have always honoured our rules and our statutes and that sometimes, as with the Reynolds case, *you find yourself in a dilemma when the American guarantee of individual rights overlaps with your duty, as an IAAF member, to follow our rules*, as has happened in this case with a district court in Ohio. I am however, convinced that regardless of any complication due to national law, you and your colleagues on the TAC Executive Committee will understand the justice of the decisions taken with regards to Reynolds and that you will do everything possible in order to conclude this case within the framework of the IAAF Constitution, in [the] name of the entire world athletics movement.

Pl's Ex. 23, at 2. It is simply an unacceptable position that the courts of this country cannot protect the individual rights of United States citizens where those rights are threatened by an association which has significant contacts with this country, which exercises significant control over both athletes and athletic events in this country, which acts through an agent organization in this country,[6]

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[6] The Court finds untenable what is apparently the tactic of the IAAF to insulate itself from the jurisdiction of any court: despite the incredible power and influence which it directly wields over track and field athletics in the United States and throughout the world, the IAAF continually maintains that it has no *direct* contact with any country or athlete, and that it only acts or has

and which gains significant revenue from its contracts with United States companies.

Regarding the inquiry which this Court must make under the Sixth Circuit's decision in *Southern Machine*, it is manifest that the IAAF has purposefully availed itself of the privilege of acting in Ohio, and has caused direct consequences to the Plaintiff in Ohio. This Court has previously listed in detail the facts supporting this conclusion and they will not be recounted here. Suffice it to say, as a general matter, Ohio athletes are subject to the Rules of the IAAF, the IAAF gains substantial revenue from the activities of these athletes, and the IAAF has recognized a track and field event to be held in Ohio. With respect to Mr. Reynolds specifically, the IAAF has contributed expense money so that Mr. Reynolds could compete in two events recognized by the IAAF, has published arguably defamatory statements which were circulated in Ohio publications, and has committed acts which may be found to have tortiously interfered with Mr. Reynolds' business relationships with both United States and Ohio companies.

Furthermore, this Court believes that as the IAAF acts through its member organizations, it is reasonable to subject the IAAF to jurisdiction anywhere its member organizations may be subject to suit. The evidence before the Court establishes that the IAAF distributes money to athletes through its member organizations, notifies athletes

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any outside contact *through* its member organizations, such as TAC. While that may be true, it must then be conceded that TAC is an agent of the IAAF and personal jurisdiction may be found to exist through TAC's contacts with this forum. *See Behagen v. Amateur Basketball Ass'n*, 744 F.2d 731, 734 (10th Cir. 1984) ("The above evidence constitutes a prima facie showing that the [Federation Internationale de Basketball Amateur] maintains continuous and substantial activity in Colorado through the actions taken on its behalf by its constituent, ABA/USA. Viewed most favorably to Behagen, the record reflects that FIBA *is* its members, and that it governs internationally related amateur basketball through its member organization in each country.").

of positive drug test results through its member organizations, and provides adjudication of disputed drug test results in the first instance through its member organizations. Essentially, the IAAF refuses to have any contact with individual athletes, instead forcing such athletes to approach the IAAF through the national organizations. Thus, this Court holds, as the Tenth Circuit held in *Behagen v. Amateur Basketball Ass'n*, that an international organization which acts through its members may be subject to the jurisdiction of a particular court based upon a member's contacts with, and activity in, the forum. Where, as here, the member organization has intervened as a Defendant in the action, the exercise of personal jurisdiction is beyond question.

Aside from all of the above, the Court holds that the exercise of personal jurisdiction over the IAAF is reasonable, fair, and constitutional because the IAAF has waived its right to contest the exercise of jurisdiction by this Court. In Reynolds I, the IAAF appeared in the action and moved, as provided in Federal Rule of Civil Procedure 12(b)(2), to dismiss on the grounds that this Court lacked personal jurisdiction over it.[7] In the current action, however, it has apparently decided *sua sponte* that this Court has no jurisdiction over it and that it need not even appear to argue the matter. Thus, the Plaintiff has been denied the ability to obtain discovery from the IAAF in order to support its claim that sufficient contacts exist between the IAAF and Ohio to support this Court's exercise of personal jurisdiction.

It is axiomatic that "[b]ecause the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). This is true because the requirement that a court have personal jurisdiction flows

[7] As noted above, the entire action was dismissed before the Court had the opportunity to rule on the IAAF's motion to dismiss.

not from Article III of the United States Constitution, but from the Due Process Clause. *Id.* at 702. Thus, regardless of the power of a state to serve process, an individual may submit to the jurisdiction of a court by appearance, and a variety of legal arrangements have been found to represent express or implied consent to the personal jurisdiction of a particular court. *See, e.g., National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) (jurisdiction based on contractual provision); *Petrowski v. Hawkeye-Security Ins. Co.*, 350 U.S. 495 (1956) (jurisdiction based on defendant's stipulation). In sum, "the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue." *Insurance Corp. of Ireland*, 456 U.S. at 704.

Generally, the entitlement to most legal rights is subject to certain procedural rules: The failure to follow such rules may well result in the curtailment of the rights. Thus, "the failure to enter a timely objection to personal jurisdiction constitutes, under [Fed. R. Civ. P.] 12(h)(1), a waiver of the objection." *Insurance Corp. of Ireland*, 456 U.S. at 705. In that case, the Supreme Court held that a district court may use Federal Rule of Civil Procedure 37(b)(2)(a)[8] to support a finding of personal jurisdiction without violating due process.

In accordance with all of the foregoing and pursuant to Federal Rule of Civil Procedure 12(h)(1) and the Supreme Court's decision in *Insurance Corp. of Ireland*, this Court holds that the IAAF's failure to enter a timely objection to personal jurisdiction, which failure resulted in the inability of the Plaintiff to obtain the necessary dis-

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[8] Federal Rule of Civil Procedure 37(b)(2)(a) provides that a district court, as a sanction for failure to comply with discovery orders, may enter "[a]n order that the matters regarding which the [discovery] order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order."

covery to establish the facts upon which he asserts the jurisdiction of this Court rests, results in the waiver of the IAAF's right to contest the personal jurisdiction of this Court. Having found the exercise of jurisdiction to be authorized by the Ohio long-arm statute and to comport with the dictates of Due Process, the Court now turns to the merits of the Plaintiff's motion for a preliminary injunction.

II. THE PRELIMINARY INJUNCTION

It is well settled that in order for a preliminary injunction to issue, a plaintiff must establish the following criteria: (1) the likelihood of the plaintiff's success on the merits; (2) whether the injunction will save the plaintiff from irreparable injury; (3) whether the injunction would harm others; and (4) whether the public interest would be served by the injunction. *International Longshoremen's Ass'n Local 1937 v. Norfolk Southern Corp.*, 927 F.2d 900, 903 (6th Cir. 1991), *cert. denied*, 116 L. Ed. 2d 38 (1991); *Tyson Foods, Inc. v. McReynolds*, 865 F.2d 99, 101 (6th Cir. 1989); *Forry, Inc. v. Neundorfer, Inc.*, 837 F.2d 259, 262 (6th Cir. 1988); *Frisch's Restaurant, Inc. v. Shoney's, Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985); *In re De Lorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982); *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366, 368 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982). The four factors used to determine the efficacy of a preliminary injunction motion are not prerequisites to a successful motion; rather, they are merely elements to be balanced in relation to one another, with no single element being dispositive. *De Lorean Motor Co.*, 755 F.2d at 1229. Thus "the degree of likelihood of success may depend on the strength of the other factors." *Id.* Moreover, the strength of the "likelihood of success that need be shown will vary inversely with the degree of injury the plaintiff will suffer absent the injunction." *Id.* (quoting *Metropolitan Detroit*

Plumbing & Mechanical Contractors Assn. v. HEW, 418 F. Supp. 585, 586 (E.D. Mich. 1976)); *Schalk v. Teledyne, Inc.*, 751 F. Supp. 1261, 1264 (W.D. Mich. 1990). However, where it is shown that the burden imposed upon a defendant by the issuance of a preliminary injunction would be equivalent to that suffered by a plaintiff, the plaintiff must show a strong probability of success on the merits in order to prevail. *Frisch's Restaurant*, 759 F.2d at 1270; *In re De Lorean*, 755 F.2d at 1229; *Schalk*, 751 F. Supp. at 1264. Thus the flexibility traditionally afforded examination of the foregoing factors is tempered by the need to analyze carefully the dynamics of the injury claimed by each of the parties in the case. *Schalk*, 751 F. Supp. at 1264 (citing *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 103 (6th Cir. 1982)).

The issue of greatest import to this Court, to the parties, and to *amicus*, is the threat of the IAAF to "contaminate," or in other words, suspend any athlete who competes against Mr. Reynolds knowing that he is currently deemed ineligible to participate in IAAF track and field events. IAAF Rule 53(ii). The Court not only finds the threat unconvincing, it finds it to be an appropriate consideration to weigh against the harm which will befall Mr. Reynolds if he is wrongfully prevented from participating in track and field competitions due to his IAAF ineligibility status.

The IAAF's threat is unconvincing for several reasons. First, it is not at all clear that IAAF's contamination rule is mandatory in nature. Indeed, documents and testimony adduced at the preliminary injunction hearing cast considerable doubt upon this proposition, and lead this Court to conclude that it is not always strictly enforced. Furthermore, it is equally unclear that the IAAF would attempt to prevent United States track and field athletes uninvolved in this litigation from participating in the Olympics on the basis of Rule 53(ii) alone. The loss of some of the event's top competitors, the resulting public out-

cry, and the possible loss of substantial revenue to the IAAF, all lead this Court to conclude that widespread "contamination" of American athletes by the IAAF is unlikely.

Even if, however, this Court considered such contamination to be the likely result if an injunction were to issue, the Court finds such a threat *by the Defendant IAAF* to be an entirely inappropriate consideration. It is, of course, axiomatic that in considering the merits of a preliminary injunction, the Court must consider whether the injunction will harm others. However, it is the impassioned conviction of the Court that such harm to others does not, and indeed, should not, include harm to others *caused by the voluntary and intentional acts of the Defendant.* To hold otherwise would be to allow the IAAF to hold the entire American Olympic team hostage against an unfavorable decision from this Court. While it remains possible that the IAAF and its members will attempt—and may even succeed—in rendering various American athletes ineligible for participation in the 1992 Summer Olympic Games, this Court finds such a threat to be inapposite to the issue at hand, and further finds the IAAF rule underlying the threat to be a grossly unsavory method of enforcing its anti-doping rules and avoiding interference in its affairs by this Court and others.

This Court also believes that Reynolds has established a likelihood of success on the merits of his claims. With respect to the validity of the drug test performed at the Lafarge Laboratory on the urine sample provided by Reynolds in Monte Carlo, this Court believes—as did the American Arbitration Association arbitrator and the TAC hearing panel—that Reynolds has created a substantial doubt as to the accuracy of the reported results. Not only did Reynolds' expert testify as to numerous deficiencies in the Lafarge Laboratories' testing procedure,[9] he

[9] For instance, Plaintiff's expert testified that the laboratory failed to attach proper chain of custody documentation to the

also testified as to several inconsistencies with the actual test results which make it highly unlikely that both samples actually originated with Mr. Reynolds.[10] Finally, and perhaps most egregious of all, Plaintiff's expert testified that nandrolone is known to remain in an individual's body for a considerable period of time, and the fact that Reynolds' urine allegedly tested positive for two metabolites of nandrolone on August 12, 1990, and tested negative for nandrolone one week later on August 19, 1990, casts considerable doubt on the validity of the August 12 test.

With respect to the claims in Reynolds' Complaint, the Court finds it likely that they are meritorious. First, it appears likely that a contractual relationship exists between the Plaintiff and both the IAAF and TAC, and it further appears that the IAAF breached this contract when it departed from its own guidelines and regulations regarding appropriate drug testing procedures. Second, it appears likely that the IAAF—with disregard for its own policy of confidentiality—maliciously released to the world media information that Reynolds had tested positive for the steroid nandrolone *before* Reynolds was accorded a hearing before TAC as prescribed by IAAF rules. It is reasonable to infer that the IAAF knew that such information would cause third parties to void existing endorsement contracts and prevent others from entering into such contracts. As such, Reynolds is likely to succeed on his claim of defamation and tortious interference with a busi-

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urine samples provided by Reynolds, failed to use an "internal standard" to assist it in interpreting the results, and failed to use a positive quality control.

[10] Plaintiff's expert testified that the "picture" of naturally occurring steroids should be relatively the same for both samples of urine if, as alleged, they were both supplied by Reynolds. He concluded, however, that because the naturally occurring steroids in the two samples created extremely different "pictures", the two could *not* have originated with the same individual.

ness relationship. *See Juhasz v. Quik Shops, Inc.*, 55 Ohio App.2d 51, 379 N.E.2d 235 (Summit Co. 1977).

Even were this Court not convinced of the likelihood that Reynolds will succeed on the merits of his claims, the fact that significant harm will befall Reynolds if the injunction is not issued weighs heavily in favor of granting the motion. As noted above, the strength of the likelihood of success that need be shown will vary inversely with the degree of injury the plaintiff will suffer absent the injunction. In other words, because this Court finds that Reynolds will suffer significant and irreparable harm if not allowed to participate in the Olympic trials, the Court need not be as diligent in considering the likelihood of success on the merits of his claims.

Finally, the Court notes that even if, after a trial on the merits of this case, it turns out that Reynolds does not succeed, little or no irreparable harm will have occurred. Because track events result in rank-ordered results, even if Reynolds places in a qualifying position and it later appears that he must be disqualified, he may simply be removed from the qualifying position and another athlete may be elevated to his position.

In sum, the Plaintiff has established that, in the absence of a preliminary injunction, he will be irreparably harmed, and the harm suffered by Plaintiff outweighs any harm others may suffer. Plaintiff has also established that the public interest will be furthered, and he is likely to succeed on the merits. Therefore it is hereby ORDERED and DECREED that:

(1) Plaintiff's Motion for a Preliminary Injunction is GRANTED;

(2) Defendants IAAF and TAC, their agents, members, officers, attorneys, servants, employees, and any and all other persons who act in concert or participation with the Defendants or who act upon the order or direction of the De-

fendants or in place of the Defendants who receive actual notice of this Order are hereby restrained and enjoined from interfering, impeding, threatening to impede or interfere, in any way the Plaintiff's ability to compete in all international and national amateur track and field competitions, including, but not limited to the 1992 United States Olympic Trials and 1992 Summer Olympic Games as a result of or in any manner connected with tests on any sample of urine attributed to him from the August 12, 1990 Herculis '90 International Track and Field Meet in Monte Carlo, Monaco;

(3) Defendants IAAF and TAC, their agents, members, officers, attorneys, servants, employees, and any and all other persons who act in concert or participation with the Defendants or who act upon the order or direction of the Defendants or in place of the Defendants who receive actual notice of this Order are hereby restrained and enjoined from threatening to suspend or contaminate and from suspending or contaminating any athlete who competes with Plaintiff;

(4) Defendants IAAF and TAC, their agents, members, officers, attorneys, servants, employees, and any and all other persons who act in concert or participation with the Defendants or who act upon the order or direction of the Defendants or in place of the Defendants who receive actual notice of this Order are hereby restrained and enjoined from threatening to contaminate or suspend Plaintiff and from suspending or contaminating Plaintiff as a result of Plaintiff's participation in any track and field competition, including those competitions in which Plaintiff participated pursuant to this

Court's Temporary Restraining Orders of May 28, 1992, and June 8, 1992; and

(5) Defendants IAAF and TAC, their agents, members, officers, attorneys, servants, employees, and any and all other persons who act in concert or participation with the Defendants or who act upon the order or direction of the Defendants or in place of the Defendants who receive actual notice of this Order are hereby restrained and enjoined from threatening to suspend or contaminate and from suspending or contaminating any other athlete who participated or competed with Plaintiff pursuant to this Court's Temporary Restraining Orders of May 28, 1992, and June 8, 1992.

This Order shall continue in effect until the trial on the merits of the Plaintiff's claims.

Plaintiff's bond in the amount of $100.00 posted in connection with the Temporary Restraining Order shall remain with the Clerk of this Court.

IT IS SO ORDERED.

/s/ Joseph Kinneary
United States District Judge

APPENDIX F

No. A-954.

HARRY L. REYNOLDS, JR.

v.

INTERNATIONAL AMATEUR ATHLETIC FEDERATION, *et al.*

June 20, 1992.

Justice STEVENS, Circuit Justice.

On June 19, 1992, the United States District Court for the Southern District of Ohio entered a preliminary injunction barring The Athletic Congress of the U.S.A., Inc. (TAC) and the International Amateur Athletic Federation (IAAF) from impeding or interfering with Harry L. Reynolds, Jr.'s ability to compete in the 1992 United States Olympic Trials. Later that day, the United States Court of Appeals for the Sixth Circuit issued an order staying the preliminary injunction. Mr. Reynolds has applied to me in my capacity as a Circuit Justice for a stay of the order of the Court of Appeals.

In my opinion, the IAAF's threatened harm to third parties cannot dictate the proper disposition of applicant's claim. The dispositive questions for me are, first, whether applicant has established a probability of success on the merits, and second, whether the availability of a damages remedy precludes a finding of irreparable harm. With respect to the first, I find the District Court's opinion persuasive. With respect to the second, a decent respect for the incomparable importance of winning a gold medal in the Olympic Games convinces me that a pecuniary award is not an adequate substitute for the intangible values for which the world's greatest athletes compete.

Of course, I recognize that this ruling may not establish applicant's right to compete in the Olympics at Bar-

celona, but that opportunity will presumably be foreclosed if he is not allowed to participate in the Olympic Trials. On the other hand, the harm, if any, to the IAAF can be fully cured by a fair and objective determination of the merits of the controversy. Indeed, applicant may fail to qualify, thus mooting the entire matter; if he does qualify, his eligibility can be reviewed before the final event in Barcelona.

The IAAF's threat to enforce its eligibility decision—no matter how arbitrary or erroneous it may be—by punishing innocent third parties cannot be permitted to influence a fair and impartial adjudication of the merits of applicant's claims.

The application for a stay is granted.

Supreme Court, U.S.
FILED
OCT 6 1994
OFFICE OF THE CLERK

No. 94-410

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HARRY L. REYNOLDS, JR.
Petitioner,

v.

INTERNATIONAL AMATEUR ATHLETIC FEDERATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a court in Ohio may exercise personal jurisdiction over an English unincorporated association for an allegedly defamatory statement about petitioner it made in London where (i) the requirements of the Ohio long-arm statute are not satisfied, (ii) the association does not own property, transact business in, or have other "minimum contacts" with Ohio, and (iii) there is no evidence that the association directed its conduct toward Ohio or knew that petitioner resided there and had other relations with that forum.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-410

HARRY L. REYNOLDS, JR.

Petitioner,

v.

INTERNATIONAL AMATEUR ATHLETIC FEDERATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

After running a race in Monaco in 1990, petitioner Harry Reynolds provided a urine sample that was found to contain steroids in tests conducted at a French government laboratory. Respondent International Amateur Athletic Federation ("IAAF"), which coordinates international track competition among the world's national federations, issued a press release at its London offices reporting the laboratory's findings and announcing that petitioner (and another athlete) had received mandatory suspensions from competition pending hearings.[1] Although a hearing committee of the U.S. national track federation concluded that the evidence was too equivocal to justify

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[1] A copy of the press release is included in the appendix to this brief.

petitioner's suspension, an international arbitration panel overruled that decision following a trial-type hearing in London in which petitioner and his counsel participated.

Petitioner then brought this diversity case in the federal district court in Columbus, Ohio, where he had grown up. He sought to set aside the arbitration award and also alleged that he had been "defamed" by IAAF's press release. Learning of the lawsuit after the district court had issued a sweeping *ex parte* temporary restraining order that suspended the arbitral decision, IAAF advised from London that it would not appear because it believed that the court lacked jurisdiction. The district court thereafter entered further injunctive relief; awarded petitioner a $27.4 million default judgment (chiefly punitive damages); and issued an order forbidding IAAF (and its lawyers) from contesting the judgment in any other court.

IAAF retained U.S. counsel and moved to set aside the default judgment when petitioner tried to enforce it. IAAF argued, with supporting evidence and affidavits, that the district court lacked personal jurisdiction and that its orders violated the United Nations (New York) Convention on the Recognition and Enforcement of Arbitral Awards. IAAF also asked the district judge to disqualify himself because of the many strong and widely-publicized statements he had made about the controversy. Without allowing argument, the district judge declined to recuse himself and then denied all of IAAF's motions.

Finding that the district court had committed an "abuse of discretion," the court of appeals reversed in a unanimous opinion. It held that the district court lacked personal jurisdiction over IAAF because petitioner had not satisfied either the Ohio long-arm statute or the well-settled standards of due process. The court of appeals did not reach IAAF's other arguments and noted that "[o]ur decision renders the IAAF's recusal motion moot."

Now, in an effort to construct a question worthy of review in this Court, petitioner in four important ways mischaracterizes the issues presented:

First, petitioner misstates the facts surrounding his "defamation" claim, which was always based on the press release issued by the IAAF in London. There was no evidence supporting the petition's assertions of additional "numerous defamatory statements" made to "promote [their] widest possible dissemination." (*See* Pet. i, 15, 19 n.12, 20, 22.) Nor was there any evidence suggesting that IAAF directed the press release toward Ohio, or was then aware that petitioner had any residence, business, or other relationship with that state.

Second, petitioner ignores the court of appeals' conclusion that his "defamation" claim does not satisfy the threshold requirements of the Ohio long-arm statute, which was the only authority for the district court's exercise of jurisdiction over IAAF.

Third, petitioner distorts the court of appeals' reasoning. Its opinion did *not* establish as preconditions for exercising personal jurisdiction that "the defendant itself must publish the libel in the forum" (Pet. 20) or that the forum must be the "single geographic 'focal point' " of an alleged defamation (Pet. 25). To the contrary, the court of appeals regarded the place of publication and location of the events addressed in the press release as but two of the many facts and circumstances that must be weighed in determining—under well-settled principles —whether IAAF had sufficient "contacts" with Ohio as to make it fair and reasonable to require IAAF to defend itself there.

Fourth, petitioner's discussion of the decisions of this Court and of other courts of appeals conspicuously disregards the consistent thread that unites them with the decision below—namely, that exercise of personal jurisdiction over a non-resident lacking other pertinent con-

tacts with the forum requires some showing of conduct *knowingly directed at the forum with knowledge that plaintiff will suffer harm there.* Petitioner has contended throughout this litigation that his claimed Ohio residence justifies the exercise of personal jurisdiction. So slender a basis for jurisdiction has never been accepted and, if it were, would give U.S. courts worldwide jurisdiction over every alleged defamation abroad of a person claiming to suffer any reputational or financial harm at his or her residence in the United States.

A. Factual Background

The Parties

The IAAF is a non-profit organization governed by the amateur track and field federations of all the world's nations. It was established in 1912 by then-existing national federations to coordinate competitions among themselves and to administer the regulations they agreed upon. The regulations embrace such matters as the ground rules for conducting track and field events (*e.g.*, width of running lanes, permissible material for use in vaulting poles); criteria for determining "amateur" status; procedures for keeping official records; prohibitions against racial, religious, political and other discrimination; and a ban on the use of performance-enhancing drugs. National federations, not IAAF, police their athletes' compliance with these rules. The IAAF "does not supervise U.S. athletes in Ohio or elsewhere." (Pet. App. 17a.)

The IAAF was located in London until several months ago, when it moved its headquarters to Monaco.[2] It has no offices or property in the United States. IAAF "owns

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[2] IAAF moved its headquarters at the invitation of the Principality of Monaco, which provided IAAF with office facilities at the nominal rent of one franc per year. There is no evidence supporting petitioner's false and undocumented assertion that "IAAF has removed itself to Monaco for the express purpose of further insulating itself from this and other litigation." (Pet. 27 n.16.)

no property and transacts no business in Ohio." (Pet. App. 17a.)

Petitioner is a world-class sprinter who grew up in Columbus, Ohio, and attended Ohio State University in that city. He is not a member of the IAAF, whose only members are the world's track and field federations. Although petitioner alleged that he is a "resident" of Ohio, he testified below that he had actually moved to California. (6th Cir. App. 1059.) The IAAF did not know (and had no reason to know) where Reynolds claimed to live at the time of the allegedly defamatory press release.[3]

The Disputed Drug Test

After competing in a race in Monaco in August 1990, petitioner was randomly selected to take a drug test under the international drug testing protocol agreed upon by the IAAF's members. Uniform test procedures were adopted because of widespread suspicions that some national federations were tolerating the use of steroids by their athletes, or applying procedural and evidentiary rules to throw out test results on grounds that many nations regarded as technicalities.

A government laboratory in Paris found that petitioner's urine sample contained a steroid universally prohibited by international athletic rules. IAAF issued a one-page press release reporting the laboratory findings and announcing that petitioner (and another athlete) were suspended from competition pending hearings. (*See* Appendix hereto.) American newspapers picked up the information through routine channels, and the news was

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[3] There was no evidence showing that IAAF was aware at the time of the press release of the petitioner's claimed Ohio residence. To the contrary, IAAF submitted an affidavit confirming that it keeps no general records concerning the addresses of athletes and that there were no specific accounting or other records relating to petitioner. (6th Cir. App. 557.)

reported by various media in the United States, including Ohio.

The TAC and IAAF Hearings

The international track and field rules provide that an athlete who tests positive for a prohibited drug may demand a hearing before his or her own national track federation. Petitioner's case was heard by a committee of the U.S. federation, then known as The Athletics Congress ("TAC"), which ruled that the chain of custody and technical questions raised by petitioner's expert witnesses "cast substantial doubt on the validity of the drug test."

A national federation's decision is final unless the IAAF Council (consisting of representatives from 25 national track and field federations) votes to request an arbitration proceeding to examine whether the national federation "misdirected itself." This procedure was established to provide a final, independent review of "doping" decisions by a panel that is free of nationalistic bias (or suspicion of bias) in favor of any country's athletes.[4] In petitioner's case, the IAAF Council voted overwhelmingly to demand arbitral review of TAC's decision. Petitioner actively participated in the arbitration personally and through his counsel. He did not challenge the panel's jurisdiction or the impartiality of the three distinguished jurists who composed the panel. He submitted voluminous documentary evidence, presented live testimony and cross-examined opposing witnesses at the two-day oral phase of the proceedings, which was held in London. The three-member arbitration panel ruled unanimously in May 1992 that none of the questions raised about the chain of custody and testing procedures impeached the reliability of the results, and that petitioner had been properly suspended for using steroids.

[4] Four drug cases (including petitioner's) have been arbitrated under these procedures. The national federation's decision has been upheld in two of the cases and overruled in the other two.

B. Proceedings in the District Court

Instead of challenging the arbitral award in the English courts in accordance with the United Nations (New York) Convention on the Recognition and Enforcement of Arbitral Awards (the "U.N. Convention"), petitioner filed this suit against IAAF in the federal district court in Columbus, Ohio.[5] He asked that the arbitral award "be declared and rendered void," and sought damages for the allegedly defamatory London press release and for resulting "interference" with his contract and business relationships.

Before the IAAF had even received copies of the pleadings, the district court (Judge Joseph Kinneary) entered an *ex parte* temporary restraining order. In practical terms, the injunction declared petitioner to be eligible to compete in international track and field meets despite the agreement among the world's national federations to be bound by the international arbitration of eligibility disputes.

In accordance with its long-standing policy, IAAF advised the district court that it would not appear in the case because it declined to recognize the court's jurisdiction. In this way, the IAAF exercised a defendant's well-established right "to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding."[6] The

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[5] The U.N. Convention appears at 21 U.S.T. 2517 (1958), and its text is printed following 9 U.S.C.A. § 201. It is a fundamental principle of the U.N. Convention that only the courts of the nation in which the arbitration has been held have jurisdiction to vacate or set aside the award. *See, e.g., International Standard Electric Corp.* v. *Bridas Sociedad Anonima Petrolera*, 745 F.Supp. 172, 175-78 (S.D.N.Y. 1990); W.M. Tupman, *Staying Enforcement of Arbitral Awards Under the New York Convention*, 3 Arb. Int'l 209, 210 (1987) ("only a court in the country of origin has jurisdiction [to vacate an award]").

[6] *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982).

IAAF has consistently resisted efforts of national courts to exercise jurisdiction in eligibility disputes on the basis of an athlete's residence, and argued that litigation must instead be brought in the country in which the arbitration is held (in this case, England).[7] (Similar disputes have arisen in the past in relation to Nigerian, Swiss and South African athletes, among others, and have been reviewed in English courts.) Were it otherwise, the eligibility of athletes would be decided by the potentially biased courts of their own country, rather than in accordance with uniform international rules applied through universally accepted procedures.

Judge Kinneary issued a preliminary injunction in June 1992,[8] followed by further orders seeking to dictate eligibiltiy determinations at the Olympic Summer Games in Barcelona and awarding petitioner a $27.4 million default judgment.[9] Based on the one-sided evidence that was presented, the court found that the London arbitration was not conducted fairly—ignoring that IAAF could not defend the arbitration's fairness without waiving its right to have all issues relating to the lawfulness of the award resolved by the English courts. The trial judge made many

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[7] There is no basis for petitioner's assertion that the IAAF insists "that its decisions are not subject to review by the judicial authority of any nation." (Pet. 3.) The Sixth Circuit correctly described IAAF's position, which is that petitioner should have brought his action in the English courts, whose jurisdiction IAAF does not challenge in this case. (Pet. App. 22a.)

[8] TAC intervened to oppose issuance of the preliminary injunction, and then appealed from entry of the interlocutory order. The court of appeals issued a stay of the injunction, which in turn was stayed by Justice Stevens on June 20, 1992. Petitioner contends that TAC participated in that litigation as the "agent" of IAAF (Pet. 11), an argument that was expressly rejected by the court of appeals. (Pet. App. 21a-22a.)

[9] The judgment included some $6 million in compensatory damages—many times more than petitioner had earned throughout his entire career—and punitive damages exceeding $21 million.

acid observations about the IAAF's refusal to accept jurisdiction in his court; he characterized IAAF as claiming "infallibility;" accused it of setting itself above the law; and he took the extraordinary step of enjoining IAAF and its lawyers from "commencing or prosecuting in any other forum any action with regard to, affecting or in any way involving the judgment." (6th Cir. App. 242.)

Petitioner, by contrast, was not prohibited from attempting to enforce the judgment anywhere. When he sought to do so, IAAF promptly engaged U.S. counsel and filed a motion (with supporting evidence and affidavits) asking Judge Kinneary to vacate the judgment for lack of personal and subject matter jurisdiction. IAAF also moved to disqualify the trial judge under 28 U.S.C. § 455(a) on the ground that his widely publicized statements and actions had called his impartiality into question. The judge refused to hear argument and denied both motions. IAAF appealed.

C. Proceedings in the Court of Appeals

In a unanimous opinion, the court of appeals found that the district court had committed an "abuse of discretion" (Pet. App. 14a) and vacated the default judgment for lack of personal jurisdiction. It did not reach the U.N. Convention or other issues presented by IAAF. (Pet. App. 8a.)[10]

Petitioner does not challenge the court of appeals' holdings that the district court lacked personal jurisdiction over IAAF with respect to his challenge to the London arbitration procedures under "contract" theories and his claim of "tortious interference" with his business relations. (Pet. App. 16a-22a.)[11]

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[10] IAAF also contended that there had never been valid service of process and that there was no basis for diversity jurisdiction.

[11] In concluding that there was no personal jurisdiction over the London arbitration and tortious interference claims, the court of

As to jurisdiction over IAAF with respect to the allegedly defamatory press release—the only issue presented by the petition—the court of appeals found no evidence satisfying the threshold requirements of the Ohio long-arm statute, much less the well-settled constitutional standards of due process. (Pet. App. 18a-20a.) Here, too, there could be no basis for IAAF to "anticipate being sued in Ohio" (Pet. App. 16a), and petitioner's claimed Ohio residence and assertion of injury in that forum could not furnish "minimum contacts" between IAAF and Ohio. (Pet. App. 18a-19a.)

In sharp contrast to "intentional, and allegedly tortious, actions . . . expressly aimed at California" in *Calder* v. *Jones*, 465 U.S. 783, 789 (1984), there was no evidence that IAAF knew of petitioner's Ohio relationships; that IAAF directed any conduct toward Ohio; that the petitioner's career or reputation was centered in Ohio; that IAAF took any steps to circulate the reports in Ohio; or that the alleged defamation concerned any Ohio events. Under well-settled standards, the court of appeals con-

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appeals overruled the district court's rulings that IAAF had "waived" its jurisdictional objections by not appearing in the district court (Pet. App. 20a-21a); that—conversely—IAAF was bound by the default judgment because it had purportedly appeared in the district court through TAC as its "agent" (Pet. App. 21a-22a); and that IAAF had actually "transacted business" in Ohio through the activities of TAC as its "agent" and by phone calls and other actions (Pet. App. 16a-18a).

Despite the court of appeals' contrary conclusions, petitioner continues to argue that "TAC always toes the line" and follows IAAF's "orders." (Pet. 4.) This is belied by the facts that TAC vigorously opposed the IAAF Council in this case and contested the matter in the London arbitration; that national federations (including TAC) established and govern IAAF, rather than *vice versa*; and that the Amateur Sports Act of 1978, under which TAC has been certified as the representative track and field federation of the United States, required TAC to prove that it is "autonomous in the governance of its sport . . . and is free from outside restraint." 36 U.S.C. § 391(b)(4).

cluded that courts in Ohio could not exercise jurisdiction over IAAF consistently with " 'traditional notions of fair play and substantial justice.' " (Pet. App. 22a, *quoting Asahi Metal Industry* v. *Superior Court*, 480 U.S. 102, 113 (1987).) The court of appeals refrained from ruling on whether Judge Kinneary should have recused himself because the issue was "moot." (Pet. App. 22a.)

Petitioner's period of suspension expired almost two years ago. He has been running in international competitions since then and he won the gold and silver medals at the IAAF World Championship games in Stuttgart in August 1993.[12]

REASONS FOR DENYING THE WRIT

The court of appeals held that petitioner did not satisfy the threshold jurisdictional requirements of the Ohio long-arm statute. Petitioner seeks no review of that dispositive state law ground for the decision below. There can accordingly be no good reason for the Court to entertain federal "due process" arguments about an issue that will not affect the judgment.

Petitioner's "due process" contentions, moreover, present no novel, unsettled or controversial question. In a dispute played out entirely in Europe—and which involved neither any relevant "contacts" between IAAF and Ohio nor any conduct knowingly aimed at that state—the court below found that it would be unfair and unreasonable to seize upon a London press release as a pretext for requiring IAAF to defend itself in Ohio. The court of appeals' fact-bound analysis faithfully follows this Court's decisions. Petitioner cites no conflicting decision by any court

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[12] Petitioner inaccurately asserts that his suspension was increased by four months because he sought relief in U.S. courts. (Pet. 1, 13.) In fact, as the court of appeals observed, the additional suspension was imposed because petitioner participated in competitions without permission during the period of his suspension. (Pet. App. 6a.)

of appeals or other court, and we know of none. Indeed, the only "confusion" (Pet. 25 n.15) arises from petitioner's efforts to wring "uncertainty" and fabricate "conflict" from a systematic misreading of this Court's decisions, the opinion below, and the decisions of other courts of appeals.

I. THE COURT OF APPEALS APPLIED WELL-SETTLED PRINCIPLES TO THE FACTS OF THIS CASE.

The court of appeals began its analysis of personal jurisdiction by stating the familiar "two-pronged test" applied in diversity cases where jurisdiction is based on a long-arm statute: "the defendant must be amenable to suit under the forum state's long-arm statute and the due process requirements of the Constitution must be met." (Pet. App. 10a, citations omitted.) It then concluded that neither requirement had been satisfied.

A. The Court of Appeals' Application of the Ohio Long-Arm Statute Is a Dispositive State-Law Basis for Decision That Makes Review of the Due Process Issues Inappropriate.

Petitioner's defamation claim did not meet the requirements of the Ohio long-arm statute, which authorizes actions in Ohio against a non-resident on claims arising from tortious injury in Ohio that is caused

> "by an act outside this state committed with the purpose of injuring persons, when [the non-resident] might reasonably have expected that some person would be injured thereby in this state." Ohio Rev. Code § 2307.382(a)(6).

There was no evidence that, at the time it issued the press release in London, IAAF (i) should "reasonably have expected" petitioner to be injured in Ohio, and (ii) acted for "the purpose of injuring" him. (Pet. App. 18a-20a.)[13]

[13] Petitioner tries to escape the need to show IAAF's specific intention to injure him at the time the press release was issued

Since the judgment has an independent basis in the court of appeals' unchallenged application of the Ohio long-arm statute, the "due process" issues raised in the petition need not be reached. The petition, in other words, presents only an academic question.

B. The Court of Appeals Faithfully Followed Well-Settled Principles of Due Process That Constrain the Exercise of Personal Jurisdiction.

As this Court has often stated, "[t]he Due Process Clause of the Fourteenth Amendment . . . permits personal jurisdiction over a defendant in any State with which the defendant has 'certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Calder* v. *Jones,* 465 U.S. at 788 (internal quotations omitted), *quoting Milliken* v. *Meyer,* 311 U.S. 457, 463 (1940); *International Shoe Co.* v. *Washington,* 326 U.S. 310, 316 (1945).

Those "minimum contacts," in turn, must be more than random or fortuitous connections; they must be acts by which the *defendant* "purposefully avails itself" of the forum state, rather than the residence or other "unilateral activity" there of plaintiff or others. *Hanson* v. *Denckla,* 357 U.S. 235, 253 (1958); *see also Asahi Metal Industry Co.* v. *Superior Court,* 480 U.S. at 108-112; *Burger King Corp.* v. *Rudzewicz,* 471 U.S. 462, 472-78 (1985); *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 291-92, 297 (1980). And jurisdiction may never be exercised unless "defendant's conduct and con-

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by stressing the district court's view that the press release was issued "with malice." (Pet. 13, 26.) But as the district court employed the term, "malice" consisted of "recklessness" in failing to investigate the Paris laboratory's findings before issuing the press release. (Pet. App. 61a, 66a.) "Malice" so defined may be sufficient to state a claim for defamation under Ohio law, but it does not meet the express jurisdictional requirement of the long-arm statute that the press release must have been issued "with the purpose of injuring" petitioner.

nection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen,* 444 U.S. at 297; *Burger King,* 471 U.S. at 474.

Applying the foregoing principles to the facts of this case, the court of appeals found no fair and reasonable basis for the exercise of personal jurisdiction. It observed that petitioner's "Ohio residence is merely fortuitous and 'unilateral activity of [the plaintiff] is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State.' " (Pet. App. 17a, *quoting Helicopteros Nacionales de Columbia, S.A.* v. *Hall,* 466 U.S. 408, 417 (1984).) It stressed that there was no showing of any " 'action purposely directed toward the forum State.' " (*Id.*) It found no basis under which IAAF should "reasonably anticipate being sued in Ohio" and said that "IAAF cannot foresee being required to defend in every forum where one of its athletes is present." (*Id.* at 16a.)

Petitioner tries to escape the court of appeals' application of these settled principles by arguing that *Calder* v. *Jones* departs from them in defamation cases. He suggests that *Calder* can be read to authorize the exercise of personal jurisdiction anywhere the target of a defamation resides and suffers injury, without a showing that the defendant consciously directed its conduct at that forum with knowledge that plaintiff would be injured there. (Pet. 16-17.)

The speciousness of the argument is revealed by the misleading manner in which petitioner first frames it. Mixing quotes and paraphrases from this Court's opinion in *Calder,* he says (Pet. 16):

> "Because the defendants had 'expressly aimed' their conduct at a California-based plaintiff, the Court concluded, they must 'reasonably anticipate being haled into court there' to answer for the effects of their Florida conduct in California. *Id.* at 790."

Calder actually says something quite different:

> "[Defendants'] intentional, and allegedly tortious, actions were *expressly aimed at California* . . . [T]hey knew that the brunt of [respondent's] injury would be felt by respondent in the State [California] in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must 'reasonably anticipate being haled into court there' . . . . An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, *knowingly cause the injury in California.*" 465 U.S. at 789-90 (emphasis added.)

Calder, in short, does not dispense with the long-standing requirement that the defendant's conduct be aimed at the *forum*, and *Calder* cannot be squared with petitioner's theory that he should be allowed to litigate in his home town simply because an alleged defamation referred to *him*.[14]

The court of appeals correctly understood and applied *Calder*. It rejected petitioner's argument that injury he allegedly suffered in Ohio could substitute for a showing of "minimum contacts" between IAAF and the Ohio forum. (Pet. App. 18a-19a.) The court did not (as petitioner contends) "hold" that there can be no personal jurisdiction in a forum unless the defendant actually publishes the alleged defamation there or unless the forum is the "single geographic 'focal point'" of the defamation. (Pet. 19, 20, 25.) Instead, the court weighed the relationships to the forum in this case against those in *Calder*

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[14] Other portions of the opinion in *Calder* confirm the Court's focus on conduct knowingly directed at the California *forum*. The plaintiff's theory of jurisdiction was that defendants "intended to, and did, cause tortious injury to respondent in California." 465 U.S. at 787. In upholding that basis for jurisdiction, the Court also noted defendants' telephone calls to California to gather information for the story (including a call to plaintiff's California residence); that plaintiff's career was centered in California; and that the events addressed in the defamation all occurred in California. *Id.* at 785-86, 788-89.

and concluded that the lack of *any* comparable connections between IAAF and Ohio make it unreasonable to require IAAF to appear and litigate there. (Pet. App. 19a-20a.) That analysis is exactly what this Court contemplated when it wrote that "the facts of each case must [always] be weighed in determining whether personal jurisdiction would comport with 'fair play and substantial justice.'" *Burger King*, 471 U.S. at 485-86, *quoting Kulko* v. *California Superior Court*, 436 U.S. 84, 92 (1978).[15]

II. THERE IS NO CONFLICT BETWEEN THE OPINION BELOW AND DECISIONS OF OTHER CIRCUITS.

Petitioner devotes many pages to the supposed "uncertainty" and "confusion" spawned by *Calder*, and asserts a conflict between the opinion below and the decisions of other courts of appeals. (Pet. 16-27.) But none of the authorities he cites reflects any such uncertainty, confusion or conflict. They differ from one another only in the sense that each decision sifts a different pattern of facts in determining whether a particular exercise of jurisdiction would be fair and reasonable. On the critical issue

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[15] Thus, the court of appeals concluded that, in contrast to *Calder*, the press release concerned activities in Europe, not the forum; petitioner's athletic career was not centered in the forum; IAAF did not publish or circulate the report in the forum; Ohio was not the "focal point" of the press release; and IAAF did not have reason to anticipate that petitioner would suffer harm in the forum. (Pet. App. 19a-20a.) And the court of appeals properly rejected petitioner's theory that jurisdiction could be based on some general foreseeability that the alleged defamation would be circulated around the world, including Ohio:

> "[T]his kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction . . . Instead, 'the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Burger King*, 471 U.S. at 474, *quoting World-Wide Volkswagen*, 444 U.S. at 295, 297.

raised by petitioner, all decisions apply *Calder's* requirement that jurisdiction must be grounded on some showing that the non-resident defendant knowingly aimed wrongful conduct *at the forum* with knowledge that the plaintiff would suffer resulting injury there. None adopts petitioner's view that the "target" of an intentional tort may sue in any forum where he or she happens to live or suffer injury.

Indeed, most of the decisions address the issue in terms that expressly reject petitioner's reading of *Calder* and belie the existence of any "uncertainty" about its meaning. For example, *Dakota Industries, Inc.* v. *Dakota Sportswear, Inc.*, 946 F.2d 1384, 1390-91 (8th Cir. 1991), observes that it was critical to the exercise of jurisdiction in *Calder* that "the nonresident defendants' . . . intentional actions were aimed at the forum state . . . . [*Calder*] allows the assertion of personal jurisdiction over non-resident defendants whose acts 'are performed for the very purpose of having their consequences felt in the forum state.' " [16]

Similar statements appear in *Core-Vent Corp.* v. *Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993) (conduct must be "expressly aimed at the forum state . . . causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state"); *Lake* v. *Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987) (conduct specifically intended to deprive plaintiffs of custody of a child in Idaho); *Brainerd* v. *Governors of the Univ. of Alberta*, 873 F.2d 1257, 1259-60 (9th Cir. 1989) (defendant "knew the injury and harm stemming from his communications would occur in Arizona");

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[16] Petitioner mischaracterizes *Dakota Industries* as a case in which "defendant did not directly ship its [infringing] goods to South Dakota." (Pet. 21.) To the contrary, the evidence showed that defendant knew that plaintiff was located in South Dakota and would suffer injury there; defendant sold infringing goods to South Dakota retailers; and the court remanded the case for findings about whether defendant made direct sales in South Dakota.

Burt v. *Board of Regents of the Univ. of Nebraska*, 757 F.2d 242, 244-45 (10th Cir. 1985), *vacated as moot*, 475 U.S. 1063 (1986) (alleged libel had "calculated injurious effect in the [Colorado] forum state," where defendant knew plaintiff was seeking staff privileges at the very hospitals to which defendant sent defamatory communications); *Hugel* v. *McNell*, 886 F.2d 1, 5 (1st Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990) (defendants "directed their actions toward the forum state, and knew that the brunt of the devastating blow . . . would be felt in the State"); *First American First* v. *National Ass'n of Bank Women*, 802 F.2d 1511, 1517 (4th Cir. 1986) (defendants' allegedly defamatory letters were "directed in their intended effect at the activities in Virginia of Virginia residents"); *Madara* v. *Hall*, 916 F.2d 1510, 1517 (11th Cir. 1990) (must be shown that defendant knew its "own purposeful acts will have some effect in the forum").

Nor do the other decisions cited by petitioner conflict with the decision below or otherwise advance his case. In *Ticketmaster-New York, Inc.* v. *Alioto*, 26 F.3d 201 (1st Cir. 1994), the defendant knew that his allegedly defamatory statements to a Massachusetts newspaper would have effects on plaintiff in the Massachusetts forum, but the Court nevertheless found that it would be unfair under all the circumstances to require the California-based defendant to appear there. In *Blue Ridge Bank* v. *Veribanc, Inc.*, 755 F.2d 371, 374 (4th Cir. 1985), the defendant "engaged in a persistent course of conduct in Virginia" by selling its publication to subscribers there, and deliberately used the article in which the defamatory statement appeared as a means of soliciting business in Virginia and elsewhere. In *Crane* v. *Carr*, 814 F.2d 758, 763-64 (D.C. Cir. 1987) (Ginsburg, J.), the court found the record incomplete concerning defendants' contacts with the forum, including their role in circulating allegedly defamatory materials in the forum. And two recent intellectual property infringement cases mentioned

in a footnote (Pet. 22 n.13) contain no hint of inconsistency with the decision below.[17]

Petitioner also argues more broadly that the cases reflect "uncertainty" about the weight that should be accorded to the forum's interest in deterring defamatory conduct occurring elsewhere. (Pet. 26-27.) Once again the decisions reveal no confusion, but display conscientious case-by-case evaluation of the facts consistent with the principle that "[i]n judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.'" *Calder* v. *Jones*, 465 U.S. at 788 (citations omitted). Petitioner is not genuinely seeking a balancing of interests, but argues for a new rule assigning conclusive weight to the plaintiff's interest in suing in his or her home forum.

Since the petition resumes the attack on IAAF's integrity and motives that was mounted below, it is appropriate to comment briefly on the assertion that the jūrisdictional principles applied by the court of appeals result in a "profound miscarriage of justice." (Pet. 2.) Peti-

---

[17] *Indianapolis Colts, Inc.* v. *Metropolitan Baltimore Football Club, L.P.*, No. 94-2578, 1994 U.S.App. LEXIS 21817 (7th Cir. Aug. 12, 1994), upheld a preliminary injunction forbidding a new Baltimore football team from using the name "Colts." The court observed, *inter alia*:

> "In *Calder* as in all the other cases that have come to our attention . . . the defendant has done more than brought about an injury to an interest located in a particular state. The defendant has also 'entered' the state in some fashion, as by the sale (in *Calder*) of the magazine containing the defamatory material."

In *Beverly Hills Fan Co.* v. *Royal Sovereign Corp.*, 21 F.3d 1558, 1563-64, 1565-66 (Fed. Cir.), *cert. dismissed*, —— U.S. ——, 63 U.S.L.W. 3109 (Aug. 9, 1994), the court reinstated a case that had been dismissed for lack of personal jurisdiction where plaintiff alleged (and defendant did not controvert) that defendant intentionally shipped its infringing products into the forum through an intermediary that was part of an "established distribution channel" created to sell the goods in Virginia and elsewhere.

tioner received a full, trial-type hearing in the London arbitration. He could have filed suit in the English courts, which have reviewed other IAAF arbitration decisions in lawsuits filed by aggrieved athletes. So it was not for lack of a remedy elsewhere that petitioner chose instead to sue IAAF in his home town, which lacked any connection with the dispute. If the courts of Ohio may exercise jurisdiction over IAAF in this case, then courts throughout the world would be reluctant to do less at the behest of their nations' athletes. Such judicial intervention would destroy a uniform system of international athletic governance that was carefully designed by the world's track and field federations to apply universal rules without interference by national courts.

The district court accepted petitioner's arguments that it was dishonorable for IAAF to be structured in such a way and contemptible for IAAF to refuse to appear in Ohio. But the district court overlooked that "the Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.' " *Burger King*, 471 U.S. at 472 (citations omitted). That principle is more important here than it is in most cases for two reasons. *First*, jurisdiction over foreign defendants requires a *stronger* showing of reasonableness than is required in relation to U.S. defendants because " '[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.' " *Asahi Metal Industry*, 480 U.S. at 115 (citations omitted). *Second*, "there can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games." *Michels* v. *United States Olympic Committee*, 741 F.2d 155, 159 (7th Cir. 1984) (Judge Posner, concurring).

CONCLUSION

The court below concluded, on the basis of all the facts and circumstances, that "IAAF could not reasonably anticipate being sued in Ohio;" that "IAAF cannot foresee being required to defend in every forum where one of its athletes is present;" and that requiring IAAF to defend itself in Ohio would not "comport[] with 'traditional notions of fair play and substantial justice.'" (Pet. App. 16a, 22a.) The court of appeals decided this case on well-settled principles that are being consistently applied by the lower federal courts. The petition presents no issue worthy of review and should be denied.

Respectfully submitted,

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October 6, 1994

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APPENDIX

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APPENDIX

EXHIBIT 4

International Amateur Athletic Federation (IAAF)
Press Release

5 November 1990

For Immediate Release

TWO POSITIVE DOPING CASES

The IAAF has the duty to report that Randy Barnes (USA) and Harry Reynolds (USA) have both been suspended following the confirmed findings of banned substances in their doping control samples.

Randy Barnes was tested on 7th August 1990 at the Malmo meeting in Sweden (an EAA Permit Meeting) where he won the Shot Put event. The Huddinge laboratory in Sweden revealed metabolites of the banned substance Methyltestosterone and a second analysis carried out on the 25th September 1990 confirmed their presence.

The case was then investigated by the IAAF Doping Commission who confirmed the positive result.

On the 24th October, the IAAF informed TAC of the result of the second test and requested TAC:

> —to note the suspension of the athlete in accordance with IAAF Rule 59 and
>
> —to offer the athlete an opportunity of a hearing in accordance with the Rules and Procedures of the IAAF.

TAC have confirmed that this has been done and the date of this hearing is expected to be fixed shortly.

Harry Reynolds was tested on 12th August 1990 at the Herculis meeting in Monte Carlo (an IAAF Permit

Meeting) where he came third in the 400m. The Paris laboratory revealed metabolites of the banned substance Nandrolone and a second analysis carried out on the 12th October 1990 confirmed their presence.

On the 17th October the IAAF informed TAC of the result of the second test and similar to the case above, TAC have confirmed to the IAAF that Harry Reynolds has been suspended and offered a hearing, the date of which is shortly to be confirmed.

IAAF
End of Release

(3)

No. 93-3884

94-410

OCT 6 1994

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1994 TERM

Harry L. Reynolds, Jr.,

Petitioner,

vs.

International Amateur Athletic Federation, et al.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

Brief for the States of Ohio and Montana as Amici Curiae in Support of Petitioner

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INTEREST OF THE AMICI CURIAE

The State "has a manifest interest in providing effective means of redress for its residents." *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). This case is illustrative; here the trial court awarded Petitioner $27,356,008 in compensatory and punitive damages based on Respondent's malicious defamation and other intentional tortious conduct that was undertaken "with ill will and a spirit of revenge toward [Petitioner]." Pet. App. 72a-73a; *see also id.* 66a-67a. The ruling below, holding that personal jurisdiction was improper in these circumstances, would severely undercut the ability of the States to provide an effective means of redress for residents who are victimized by international tortfeasors. The amici States and their citizens thus are directly affected by this ruling.

In this case, an international association exercises pervasive control over the professional life of a state resident. That association committed an intentional tort against Petitioner by deliberately distributing a defamatory press release through the international media that was calculated to cause and did cause his personal and professional ruin by devastating his reputation in the forum State, where he resides. By holding that the association cannot be haled into court to answer for its wrongdoing, the Sixth Circuit's ruling would remove the only effective means by which the States can protect their citizens against intentional wrongdoing by such international entities.

The "manifest interest" of the States in protecting their citizens is clearly present in tort cases:

> "'A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to

> afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort.'"

Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778 (1984) (quoting *Leeper v. Leeper*, 319 A.2d 626, 629 (N.H. 1974), which was quoting *Restatement (Second) of Conflict of Laws* §36, cmt. c (1971)). The State's interest is particularly strong when the case involves intentional torts such as libel:

> This interest extends to libel actions .... False statements of fact harm both the subject of the falsehood *and* the readers of the statement. [The State] may rightly employ its libel laws to discourage the deception of its citizens. There is "no constitutional value in false statements of fact."

Keeton, 465 U.S. at 776 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)) (emphasis in original).

The strength of the State's interest is clear enough when the plaintiff, as in this case, is a state resident. In *Keeton*, moreover, the Court held that the State's interest in permitting redress through libel actions is especially strong -- so strong that it may exercise jurisdiction over a libel defendant even when the plaintiff is a nonresident. *Id.* at 776-777.

The States also have an interest in other factors in the determination of personal jurisdiction:

> [C]ourts in "appropriate case[s]" may evaluate ... "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the

> interstate judicial system's interest in obtaining the most efficient resolution of the controversies," and the "shared interest of several States in furthering substantive social policies."

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)). The States therefore have a shared interest in asserting personal jurisdiction in order to further their substantive social policies and to obtain the most efficient resolution of controversies.

Of course, the factors of interest to the plaintiff and the States must be balanced against the burden imposed on the defendant by defending a case in a foreign forum. The States have no wish, and no constitutional authority, to assert jurisdiction that would not comport with "fair play and substantial justice," as required by the Due Process Clause. Nonetheless, in cases where egregious intentional torts have been perpetrated against state citizens on an international scale, the recognized interests of the plaintiffs and their States are particularly strong.

It has been said that personal jurisdiction is "a very real problem which cuts to the heart of a federal court's ability to practice its trade." *Hugel v. McNell*, 886 F.2d 1, 2 (1st Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990). The same is true, of course, of the state courts, but the amici States would also contend that personal jurisdiction cuts even deeper than this. The ability to assert personal jurisdiction over defendants permits each State to secure redress for its citizens against wrongdoing, and thereby to enforce principles of the common law that have long served to create and protect an orderly society within each State. Without the ability to bring defendants to answer for injuries done to their

citizens, the States would have lost an important piece of their traditional authority to govern. For this reason, it is vitally important for each State to be able to exercise personal jurisdiction over international associations that exert pervasive influence and control over state citizens in the increasingly internationalized economic and social life of our Nation.

QUESTION PRESENTED

Whether it comports with "traditional notions of fair play and substantial justice" under the Due Process Clause for a State to exercise personal jurisdiction over an international association that wields virtually absolute power over the professional conduct of a plaintiff state citizen, when the association deliberately directs tortious acts at the plaintiff that predictably cause him devastating financial and personal injury in the forum State.

REASONS FOR GRANTING THE WRIT

The court below concluded that the Due Process Clause does not permit an international association to be haled into court in the State where the plaintiff resides to be made to answer for its intentional tortious conduct. It reached this holding without regard to the important facts that the association controls nearly every aspect of the plaintiff's professional life, and that it purposely directed injurious conduct towards the plaintiff, the brunt of which was felt within the forum State.

The ruling below runs contrary to this Court's precedents. It also exemplifies a substantial conflict among and within the Federal Courts of Appeals and the high courts of the States. That conflict is felt especially sharply by the State of Ohio and its citizens, for the Sixth Circuit and the

Ohio Supreme Court have now rendered diametrically opposed rulings on the issue of personal jurisdiction raised here. As a general matter, moreover, if the ruling below is allowed to stand, it will allow international organizations located offshore, which increasingly exercise pervasive control over the professional and personal lives of American citizens, deliberately to harm those citizens without fearing any possibility of redress in the Federal and state courts.

I. THE ISSUE OF PERSONAL JURISDICTION PRESENTED IN THIS CASE HAS VAST IMPLICATIONS FOR THE ABILITY OF STATES TO CONTINUE TO PROTECT AND VINDICATE THE RIGHTS OF THEIR CITIZENS AGAINST INTERNATIONAL TORTFEASORS WHOSE WRONGDOING AFFECTS THE PERSONAL AND PROFESSIONAL LIVES OF STATE CITIZENS.

A. The Court's Relaxation of Jurisdictional Standards in the Face of the Increasing Internationalization of the American Economy and of American Life.

This case presents unique facts regarding international entities that have profound effects on the lives of State citizens. Although Petitioner's dispute is with an international sports association, the growing proliferation of similar international associations, in various fields, imbues this case with significance that extends well beyond the arena of amateur sports.

This Court has observed that in the context of personal jurisdiction, the limits imposed upon state jurisdiction by the Due Process Clause have been "substantially relaxed over the years." *World-Wide*

Volkswagen, 444 U.S. at 293-94. This appropriate trend is "largely attributable to a fundamental transformation in the American economy." *Id.* The trend was first noted in *McGee*:

> [A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

355 U.S. at 222. In *World-Wide Volkswagen*, the Court pointed out that "[t]he historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided." *World-Wide Volkswagen*, 444 U.S. at 294.

This case presents the Court with the opportunity to consider and address the next development in this apparently inexorable trend, which is the growing internationalization of the American economy, and indeed of the world economy. It has been widely remarked in the last decade that Americans have come more and more to live and work in a truly global frame of reference. Virtually all of the products produced by American companies or consumed by American

citizens are now, either in part or in full, international in character. Numerous articles in news and business publications discuss and ponder the new "internationalization" of American business and American economic life. *See, e.g.*, Friedman, *The World, When Money Talks, Governments Listen*, New York Times, July 24, 1994, §4, at 3.

In fact, the economy is but one aspect of American life that is undergoing a global transformation. Much of modern scientific research is, and indeed must be, conducted within the framework of the international scientific community. *See, e.g.*, Organization for Economic Co-Operation and Development, *The Dawn of Global Scientific Co-Operation: Interview with Senior Astronomer Francoise Prederie*, OECD Observer, Apr. 1994, at 4. International computer networks are rapidly changing the ways that people all over the world are able to interrelate. In particular, recent developments in computer and broadcast technology have entirely transformed the nature and reach of the international media -- the potent mechanism that Respondents deliberately utilized in this case to defame Petitioner. *See, e.g.*, McGourty, *Highway to the Global Netropolis*, Daily Telegraph, May 4, 1994, at 20; Rheingold, *Networking Brings Power to the People*, Daily Telegraph, May 11, 1994, at 16.

As this case clearly illustrates, many sports and other contests have also become predominantly international in character. Athletes and other contestants are now being controlled to an increasing degree by international organizations. *See, e.g., Sports People: Inquiry on Connors*, New York Times, Feb. 28, 1986, at A24 (Men's International Professional Tennis Council fined American tennis player for the "major offense" of "aggravated behavior," which was his decision to forfeit a match). In the

same manner, cultural life, including many of the performing arts, have been international in character for many years. More generally, international organizations and associations now set standards and dictate procedures for American citizens in virtually every arena of life. As this case also illustrates, such entities have the power to wield enormous influence over American citizens, and can cause them enormous harm, especially in a world marked by instantaneous communications that can saturate the globe. At the same time, these same entities generally derive great benefit from their American alliances.

Under the current understanding of the Due Process Clause, a State may exercise jurisdiction over the person of a nonresident defendant when there exist "minimum contacts" between the defendant and the forum State. The requirement of minimum contacts is, in part, imposed to protect defendants from inconvenient litigation. The protection from inconvenient litigation is generally described in terms of reasonableness; the contacts must be such that the maintenance of a suit in the forum State "does not offend 'traditional notions of fair play and substantial justice.'" *World-Wide Volkswagen*, 444 U.S. at 291-92 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)). Nonetheless, the defendant's burden of having to defend a suit in a foreign jurisdiction will be considered in light of several countervailing factors, which include any benefits the defendant derives from contacts with the forum State as well as the State's interests in adjudicating the dispute, in affording relief to state residents, and in furthering its own substantive social policies. *World-Wide Volkswagen*, 444 U.S. at 292.

This Court, as long ago as *McGee* and *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958), recognized that improvements in modern transportation and communication

have made it less burdensome for a party located outside a State to defend itself:

> As technological progress has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, 95 U.S. 714, to the flexible standard of *International Shoe Co. v. Washington*, 326 U.S. 310.

Hanson, 357 U.S. at 250-51; *see also World-Wide Volkswagen*, 444 U.S. at 294. Because of the increased internationalization of American institutions and American life, this Court should consider in this case whether the limits imposed on State jurisdiction should be similarly relaxed with respect to foreign defendants who derive substantial benefits from their contacts with the forum State and who may direct intentional conduct toward its residents.

The trend in the Court's decisions toward more elaxed standards is, however, finite and controlled by due process:

> [I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts .... Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of

> territorial limitations on the power of the respective States.

Hanson, 357 U.S. at 250-51 (citation omitted); *see also World-Wide Volkswagen*, 444 U.S. at 294. The Court has held that even if the forum State has a strong interest in applying its law to the controversy, "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *Id.* (citing *Hanson*, 357 U.S. at 251, 254).

The issue before the Court in this case is to determine how far this trend in its decisions should be reflected in cases that extend into the international sphere, while still comporting with the constitutional principles of due process. There have, of course, been prior cases in which the Court has considered the issue of personal jurisdiction in an international context. *See, e.g., Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102 (1987); *Helicoptoros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984). Those cases, however, have generally concerned commercial matters, rather than intentional torts, and have addressed corporate parties whose international activities are felt in discrete commercial transactions rather than in exerting powers of direct governance over American citizens. In a sense, this case is one of first impression because it presents the Court with a situation in which an international association sits offshore and wields almost absolute authority over a State citizen's ability to practice his profession, while deriving substantial benefits from the forum State and this country as a whole. It is simply not appropriate for such an entity to assert that the Due Process Clause allows it to commit intentional tortious acts against an American citizen without having its conduct subjected to scrutiny in an American court.

B. The Need for More Well-Defined Standards of Personal Jurisdiction Outside the Specific Context of Commercial Transactions Between an Individual and a For-Profit Business Entity.

This case also presents the Court with an opportunity to define more clearly the constitutional standards for asserting personal jurisdiction in a noncommercial setting. In virtually every personal jurisdiction case considered by this Court, and also by the lower courts, the jurisdictional issue was raised in situations where a for-profit business entity had engaged in a discrete commercial transaction. Even in the recent libel cases of *Keeton* and *Calder v. Jones*, 465 U.S. 783 (1984), the defendants were owners or employees of for-profit business enterprises in the information field, which had substantial commercial contacts with the forums involved through the marketing and circulation of their publications. In each case, the issue of personal jurisdiction turned, at least in part, on a careful analysis of the specific, for-profit activities engaged in by the defendant.

This case, by contrast, involves an international association organized as a non-profit entity. By definition, therefore, that entity has not derived profit from its transactions with Petitioner or from transactions that occurred in the forum state. This is not to say, as explained below, that Respondent International Amateur Athletic Federation (IAAF) has derived no benefit from its relationship with Petitioner or with Ohio and other States. To the contrary, Respondent IAAF has derived substantial economic and noneconomic benefits from the control it exercises over United States athletes, including Petitioner, and from the exposure and revenues it obtains by its use of the communications and broadcast media throughout this

country. The important point here, though, is that these benefits are not narrowly "commercial" in the sense that they do not derive from discrete commercial transactions or from the marketing of a specific product.[1]

In personal jurisdiction cases, a commercial entity is considered to be inconvenienced because of the expense and risk of litigating in a distant forum, which may seriously undermine its ability to do business at all. This consideration, at least in part, was decisive in the Court's decisions that jurisdiction was improper in *Asahi* and *World-Wide Volkswagen*. As the Court stated in *World-Wide Volkswagen*:

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson v. Denckla*, 357 U.S. at 253, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigations by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.

444 U.S. at 297. The Court thus observed that the possibility of litigation is a recognized cost of doing business in a particular State, which necessitates that a corporation have "clear notice that it is subject to suit there." *Id.* Therefore, the Court reasoned, unless a commercial entity undertakes some affirmative act to subject itself to liability in

---

[1] This is also not to say that the harm suffered by Petitioner from Respondents' intentional tortious conduct is anything other than economic in nature; Petitioner sustained and continues to sustain substantial economic injury in his State of residence from the defamation that Respondents deliberately directed at him.

a forum State, it would be unreasonable to expose it to liability there.

In situations that do not involve discrete commercial transactions, and particularly where the issue is raised by an international standard-setting organization, these concerns are more attenuated. An international non-profit association such as the IAAF is not "doing business," at least in the ordinary sense of the phrase, although it does derive substantial economic benefit from its operations. It will continue to set standards for athletes worldwide, regardless of the outcome of any lawsuit brought against it. In addition, it is clear that Respondent IAAF is well aware of its vulnerability to suit, for it has recently moved to Monaco for the purpose of better insulating its activites from judicial redress. *See* Pet. 27 n.16. It therefore can hardly be "unreasonable" or "unforeseen" for such an entity to be haled into court for committing an intentional tort against one of the athletes it purports to regulate and control.

By their very nature, the actions taken by international standard-setting associations are more intrusive into the lives of particular American citizens than the actions taken by commercial corporations located in other parts of the world. By purporting to set mandatory standards for athletes worldwide, for example, Respondent IAAF has taken affirmative action to impose its control upon the professional lives of all the athletes it regulates, many of whom are American citizens. Its control over their lives includes substantial influence over their personal and professional reputations by manipulation of the international communications and broadcast media. The actions of Respondent IAAF in this case thus will serve as a model for various other organizations that perform similar functions in other fields. If the ruling below is permitted to stand, then international standard-setting organizations will know for

certain that they can locate themselves offshore and act with complete impunity, all while wielding tremendous power over American citizens and obtaining substantial benefits from American corporate subsidies. Even when such an entity specifically aims its intentional wrongdoing at a particular American citizen in his State of residence, the citizen is helpless and the State is powerless to call the tortfeasor to account in any American court. *See* Pet. 23-28 & nn. 14 & 16.

Given the increasingly international character of American life at the end of the twentieth century, it is likely that the trend toward globalism in many fields will only accelerate more rapidly in the years ahead. The ruling below creates the potential for great harm to the States and their citizens in a variety of fields, without any realistic prospect of judicial redress. For this reason alone, the Court should grant certiorari in this case in order to define more clearly the standards for personal jurisdiction as applied to international entities such as the IAAF.

C. The Continuum Between *Calder* and *Keeton*, at One End, and *World-Wide Volkswagen* and *Asahi*, at the Other End, Should Be Further Defined.

In a diversity case in which personal jurisdiction is at issue, the court must first inquire whether the assertion of personal jurisdiction satisfies the law of the State in which the case is brought. *See, e.g.*, *Calder*, 465 U.S. at 786 n.5.[2] Most of the States confer jurisdiction that extends to the

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[2] There is no question in this case that the intentional tortious conduct engaged in by Respondents is encompassed within Ohio's assertion of its long-arm jurisdiction. *See* Ohio Rev. Code §2307.382(A)(6); Ohio R. Civ. P. 4.3(A)(3).

limits of due process, and therefore the determination usually turns solely on the proper application of the Due Process Clause. These requirements were summarized by the Court in *Calder*:

> The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has "certain minimum contacts ... such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

465 U.S. at 788. The Court has explored the contours of this "minimum contacts" test in a number of cases over the years. The cases have established a continuum of sorts, all with regard to the "relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); *Calder*, 465 U.S. at 787. Specifically, this Court held in *World-Wide Volkswagen* that the defendant must "purposefully avail[] itself of the privilege of conducting activities within the forum State." 444 U.S. at 297; *see also Hanson*, 357 U.S. at 253. The proper interpretation and application of these concepts in different situations has been the crux of numerous cases, both in this Court and in the lower Federal and state courts.

This continuum has at one end the Court's decisions in *Asahi* and *World-Wide Volkswagen*; at the other end are *Calder* and *Keeton*. *Asahi* held that merely placing a product into the "stream of commerce" with the awareness that it could wind up in the forum State, without more, is "not an act of the defendant purposefully directed toward the forum

State." 480 U.S. at 112. Similarly, *World-Wide Volkswagen* held that where the plaintiff carries the defendant's product, even a product that is inherently mobile, into the forum State, the "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." 444 U.S. at 298 (quoting *Hanson*, 357 U.S. at 253). Thus, where contact between the defendant and the forum State is attributable to acts by others that were not directed by the defendant itself, the Due Process Clause would appear to provide that the defendant cannot be subject to suit in the forum State, at least in cases that do not involve intentional torts.

By contrast, *Calder* and *Keeton* held that when a party is charged with intentional tortious acts that are expressly aimed at the forum State, the party must "reasonably anticipate being haled into court there." *See, e.g.*, *Calder*, 465 U.S. at 790. Both *Calder* and *Keeton* were libel suits in which the defendants were publications (or their reporter employees) whose circulation included the forum State. The defendants were found to enjoy direct and substantial economic benefit from the forum State, and the Court therefore concluded that it was proper to emphasize the "effects" of their conduct in the forum State in determining whether they could be subject to suit there. *See Calder*, 465 U.S. at 788-89.

In this case, an international organization that does not itself own or control the national or international news media, nevertheless made deliberate use of those media to commit an intentional tortious act against Petitioner, the effects of which were calculated to be felt most directly in the forum State where he resides. Respondent IAAF does not directly control the media in the forum State. It does, however, obtain substantial economic benefit from the media

in the forum State in the form of increased exposure and broadcast revenues.[3] In this case, moreover, Respondent IAAF committed an intentional tort that was aimed specifically at Petitioner and was calculated to harm him in the forum State of Ohio and worldwide.

The Court has traditionally held that in judging minimum contacts, "a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.'" *Keeton*, 465 U.S. at 775 (quoting *Shaffer*, 433 U.S. at 204). The Court's opinions in both *Keeton* and *Calder* indicate that the relationship among the three entities is considered quite differently when an intentional tort is involved, rather than mere negligence, strict liability, or liability based on the terms of a contract. An intentional tort directed at a particular individual renders the connection between the defendant and the forum more substantial. *Keeton*, 465 U.S. at 775-776. The specific legal issue

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[3] At the same time, it must be understood that the IAAF obtains other substantial benefits from the forum State as well. For example, the IAAF benefits from the revenues it obtains from American companies, many of whom do business in the forum state, which take the form both of direct monetary subsidies and of broadcast revenue. *See* Pet. 4. Perhaps more importantly, the IAAF obtains the benefit of virtually complete control over all track-and-field athletes, including many American citizens and residents of the forum State, who wish to compete in the international arena. This control is exercised directly by declaring athletes ineligible to compete in international competitions for alleged violations of IAAF rules; it is also exercised indirectly by declaring athletes ineligible if they dare to compete against so-called "outlaw" athletes during a suspension. This case demonstrates both forms of control at work, since the IAAF enforced its invalid suspension of Petitioner by threatening to disqualify any American athlete who ran in a meet with him, and by pressuring meet directors into withdrawing invitations for Petitioner to compete in their meets. The American agent of the IAAF -- Respondent The Athletic Congress -- carried out the IAAF's dictates even to the point of defying controlling orders of the United States courts. *See* Pet. 12.

presented here is whether the commission of an intentional tort calculated to have its principal effects in the forum State, without the further connection of direct control over the media through which the tort is perpetrated, is enough to increase the connection between the defendant, the forum, and the litigation to provide the "minimum contacts" required by the Due Process Clause.

The Court addressed this issue in *Calder* in its analysis of whether personal jurisdiction could properly be exercised over the defendant employees of the defendant publication:

> Petitioners are correct that their contacts with California are not to be judged according to their employer's activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction.... In this case, petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis.

465 U.S. at 790. Respondents, of course, are not employees of the publications that disseminated the defamatory statements here. On the other hand, Respondents were the "primary participants in an alleged wrongdoing intentionally directed at [an Ohio resident,]" and in accordance with *Calder*, "jurisdiction over them is proper on that basis." *Id.* As explained below, *see infra* Part II, most of the Federal and state courts that have considered the issue have interpreted *Calder* to indicate that it is the nature and effects of the tort, and not control of the medium, that determine whether personal jurisdiction is proper.

At a minimum, therefore, this case presents the Court with an opportune vehicle to clarify the import of the spectrum of decisions that have now applied the Due Process Clause to cases concerning personal jurisdiction over intentional tortfeasors.

II. THE RULING BELOW EXEMPLIFIES A DEEP CONFLICT WITHIN AND AMONG THE FEDERAL CIRCUIT COURTS AND STATE HIGH COURTS ABOUT THE PROPER INTERPRETATION OF THE COURT'S DECISIONS IN *CALDER v. JONES* AND *KEETON v. HUSTLER MAGAZINE, INC.*

A. The Decision Below Exemplifies a Continuing Confict Among the Federal Circuit Courts.

The decision of the court below conflicts with the decisions of several other Federal Courts of Appeals. For instance, in *Hugel v. McNell*, 886 F.2d 1 (1st Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990), nonresident defendants made the supposedly defamatory allegation that the plaintiff had engaged in illegal securities activities. Although the plaintiff resided in New Hampshire, the allegations were made to *Washington Post* reporters. The *Post* printed a story that was eventually carried by different media in New Hampshire. The First Circuit determined that the nature of the intentional tort rendered the intervening actions of the reporters and editors of the *Washington Post* "irrelevant to the question of whether New Hampshire can exert personal jurisdiction over" the defendants. *Id.* at 5. The Court held that the defendants could reasonably expect to be haled into court in New Hampshire, and the assertion of jurisdiction satisfied due process. In this case, likewise, the intervening actions of the international media should be irrelevant to the

question of personal jurisdiction. Respondent IAAF, by intentionally defaming Petitioner, should reasonably expect to be haled into court in the State where Petitioner resides, and where the brunt of the blow would be felt from their intentional tortious conduct.

In *Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257 (9th Cir. 1989), the defendant, an official of a Canadian university, had a telephone conversation with an official of the Arizona university where the plaintiff was employed. During the telephone conversation, the defendant made allegedly defamatory statements about the plaintiff's integrity. The Ninth Circuit stated that it is the quality, and not the quantity, of the contacts between the defendant and the forum that determine personal jurisdiction. *Id.* at 1259. The court, citing *Calder*, held that even though the defendant did not initiate the contact, the defendant knew that the statements would cause harm in Arizona and thus had "not presented a compelling case that jurisdiction would be unreasonable." *Id.* The same is true in this case: Respondent IAAF knew and intended that its press release would cause harm in Ohio, where Petitioner resides, and worldwide. Respondents thus have not shown that jurisdiction would be unreasonable here.

First Am. First, Inc. v. National Ass'n of Bank Women, 802 F.2d 1511 (4th Cir. 1986), also runs contrary to the ruling below. That case involved a national membership organization (National Association of Bank Women or NABW), which had no business address of any kind in Virginia, and distributed all its publications and other services from its home State of Illinois. Plaintiff, a Virginia-based travel agency, solicited business from NABW's members, in competition with the Illinois-based travel agency approved by NABW. The executive director of NABW wrote allegedly defamatory letters to NABW members

nationwide about the plaintiff. The Fourth Circuit, citing *Calder*, held that "jurisdiction over these defendants can be exercised constitutionally" in Virginia. The Court stated, as the basis for its holding, that "[t]he allegedly defamatory letters, though written in and mailed from Illinois and distributed throughout the country, were nevertheless directed in their intended effect at the activities in Virginia of Virginia residents." *Id.* at 1517. Similarly, in this case the defamatory news announcements by Respondent IAAF, though released in England and Monaco and distributed internationally, were directed in their intended effect at the activities of an Ohio resident. Nonetheless, the Sixth Circuit found that personal jurisdiction could not be exercised in this case.

A further case involving defamatory statements emphasizes the prevailing application of *Keeton* and *Calder* as hinging critically upon the intentional nature of the tortious conduct. In *Burt v. Board of Regents of University of Nebraska*, 757 F.2d 242 (10th Cir. 1985), *vacated on other grounds*, 475 U.S. 1063 (1986), a Colorado resident brought suit against a Nebraska university official for allegedly making defamatory statements about him in a letter that was transmitted to Colorado. Extensively citing both *Keeton* and *Calder*, the Court held:

> Although the libel in *Calder* was pursuant to a commercial enterprise, whereas here the alleged defamation resulted from a single letter, we do not find this distinction significant in view of the Court's repeated emphasis in *Calder* on the intentional nature of the defendants' conduct and its calculated injurious effect in the forum state.

Similarly, in this case the libel resulted from a single press release that was deliberately calculated to damage Petitioner's reputation in Ohio, his State of residence, and worldwide. The distinction between a press release and letter should not be seen as significant, however, in view of *Calder*'s emphasis on the intentional nature of the conduct and the injurious effect it was intended to have and did have on its target in the forum State.

The ruling below thus places the Sixth Circuit at odds with these other courts in its interpretation and application of this Court's decisions in *Keeton* and *Calder*. But the extent of this conflict is shown also by noting that some other decisions appear to align with the ruling below.

In *Madara v. Hall*, 916 F.2d 1510 (11th Cir. 1990), for example, the Eleventh Circuit held that personal jurisdiction could not be maintained under the Due Process Clause against an entertainer who was alleged to have defamed a Florida resident by making statements to a reporter for circulation in a national magazine. The Court essentially held that because the alleged tortfeasor was not himself the publisher of the magazine and did not directly "control its circulation and distribution," he could not be sued in the federal courts in Florida, even though he may have been aware that the magazine with his statements would be circulated there. *Id.* at 1519. This ruling is consistent with the ruling below in this case, but cannot be squared with the decisions described above.

Similarly, in *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482 (9th Cir. 1993), a different panel of the Ninth Circuit found no personal jurisdiction in another libel case, over a strong dissent that would have reached the opposite conclusion by applying *Brainerd*. The case arose from articles published by three Swedish doctors in international

publications on the subject of dental implants. The articles, which were presumed to have been published at the defendant's direction, allegedly defamed the plaintiff, which is the defendant's chief competitor in the world market for dental implants. Suit was brought in federal court in California, where the plaintiff is incorporated. The majority held that there was "purposeful availment" under *Calder*, 465 U.S. at 789, because the alleged libels were intended to cause harm in the forum State and had their most substantial economic effects there. 11 F.3d at 1486-87.[4] Yet the majority went on to conclude that it would be unreasonable to allow the lawsuit to proceed there. The dissent sharply disagreed, noting that personal jurisdiction in this case would comport with the decisions in *Calder* and *Keeton*, as well as with the Ninth Circuit's own earlier rulings in cases such as *Brainerd*. *See id.* at 1492-95.

In short, the ruling below exemplifies and exacerbates an existing conflict among and within the Federal circuit courts. The conflict is over the proper interpretation and application of this Court's decisions in *Keeton* and *Calder* to intentional libels perpetrated by deliberate use of the communications media and other media that are calculated to cause and that do cause direct harm to the plaintiff's reputation in the plaintiff's State of residence. This case

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[4] The existence of libelous conduct that was intentionally and purposefully directed at the plaintiff, with full knowledge that the brunt of its effects would be felt by the plaintiff in his or her State of residence, distinguishes the case at hand, and the cases described in the text, from other cases in which the allegedly libelous comments were made in circumstances that demonstrate no such calculated purpose. *Cf. Wilson v. Belin*, 20 F.3d 644 (5th Cir. 1994) (no jurisdiction found where comments were made in an unsolicited telephone interview); *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201 (1st Cir. 1994) (same).

merits review to address and resolve this continuing decisional conflict.

B. This Circuit Split Is Exacerbated by Numerous Conflicting Decisions by State High Courts.

The ruling below is also at odds with numerous state decisions that interpret *Keeton* and *Calder* to allow personal jurisdiction to be exercised over tortfeasors when their conduct is aimed specifically at a state resident and the harm occurs at least partly within that State, even if other contacts with the State are minor or nonexistent.

In *Krantz v. Air Line Pilots Ass'n Int'l*, 427 S.E.2d 326 (Va. 1993), for example, the plaintiff, a pilot, engaged for a time in a strike against his employer. He later withdrew from the strike and applied for a job with another airline. One of the defendants, another pilot who lived in New York, recorded a message on his personal computer in New York that was derogatory to the plaintiff and then sent it out over a nationwide computer network centered in Virginia. That message generated hundreds of further derogatory comments that prevented the plaintiff from obtaining employment. The Virginia Supreme Court held that the defendant's action taken in New York "was only the beginning of his plan to [harm the plaintiff]. To execute his plan, [the defendant] needed other persons to communicate his message" and intended for them to do so. *Id.* at 328. Thus, although the defendant's only "contact" with the forum State was his single use of a nationwide computer network "as a means of furthering his plan to [harm the defendant,]" that was ruled sufficient to satisfy the Due Process Clause in view of his intentional tortious conduct. *Id.* The same conclusion should have been reached also in this case, where Respondent IAAF purposely availed itself of the international

news media as the means to distribute its defamatory statements into the forum State where they predictably caused serious harm to Petitioner.

Similarly, in *Shaw v. North Am. Title Co.*, 876 P.2d 1291 (Haw. 1994), the plaintiff was a Hawaii resident who was negotiating with various creditors to improve his credit rating. Plaintiff had earlier refinanced a property he owned in California through a California bank that used the services of defendant, a California title insurance company. As a result of that transaction, the defendant had issued several checks payable to the plaintiff's creditors. At the plaintiff's request, however, the checks were sent directly to him. He held those checks for approximately a year before transmitting one of them to a creditor, who dishonored it because in the meantime defendant had transferred its bank account to a different bank. Plaintiff sued, and defendant raised the issue of personal jurisdiction. The Court acknowledged that defendant had not transacted any business in the State of Hawaii. It nonetheless held that personal jurisdiction was proper because the complaint alleged intentional tortious conduct that was calculated to cause injury in the forum State and the effects of which were felt there. *Id.* (applying *Calder*). A similarly strict application of *Calder* would also uphold the District Court's decision to exercise personal jurisdiction over Respondents here.

The conflict in the Federal and state decisions thus creates a quandary for the States and their residents on the issue of when personal jurisdiction can constitutionally be exercised against such intentional tortfeasors. The States' vital interest in protecting their citizens from injury by providing a forum in which they can seek redress may be frustrated, and the protection of their citizens may be jeopardized, because the standards for exercising personal jurisdiction are so uncertain as to be incorrectly and

inconsistently applied. This state of affairs is intolerable, and hence warrants further review in this case.

C. The General Split in the Courts Is Heightened for the State of Ohio and Its Citizens, in Particular, by a Direct Conflict Here Between the Sixth Circuit and the Ohio Supreme Court.

The disagreement among the Federal and state courts is especially acute for the State of Ohio and its citizens, for the Sixth Circuit's ruling in this case is inconsistent with a recent decision by the Ohio Supreme Court on the same issue. The existence of such opposing decisions, if not harmonized by this Court, can only exacerbate general concerns about forum-shopping.

Unlike the court below, the Ohio Supreme Court has broadly construed *Keeton* and *Calder* to conclude that personal jurisdiction is proper whenever "the defendant has intentionally directed his activity at forum residents, ... and the 'effects' of the activity occur in the forum state." *Fallang v. Hickey*, 532 N.E.2d 117 (Ohio 1988) (citing *Burger King* and *Calder*). The Ohio Supreme Court thus squarely adheres to the "effects" test that this Court laid down in *Calder*.

In *Fallang*, the plaintiff alleged that he had been libeled by defendant, a South Carolina resident who had written a letter in South Carolina and mailed it to another individual in Ohio. The Court acknowledged that the defendant's only contact with Ohio was that single letter, but noted that defendant's action was intentional and tortious, and that "any injury to [plaintiff's] reputation has occurred in Ohio." *Id.* at 119. Because "the defendant has intentionally directed his activity at forum residents," and the "effects" of

the activity were felt in the forum State, "a high degree of unfairness is required to erect a constitutional barrier against jurisdiction." *Id.* at 120 (citing *Keeton* and *Calder*). Personal jurisdiction was therefore held to be proper.

Once again, in this case Respondents specifically targeted their intentional tortious conduct at Petitioner, with full knowledge that the brunt of its harmful effects upon Petitioner's reputation would be felt by him within the State of Ohio, where he resides. And in this day and age, there is no principled basis for distinguishing between the deliberate distribution of a press release through the broadcast and communications media and the deliberate distribution of a private letter through the mails, as the First Circuit essentially held in *Hugel*, 886 F.2d at 5. Indeed, for purposes of a defamation action, the former conduct is almost inevitably more intentionally calculated to harm the target's reputation, and is more likely to do so, than the latter. *See also* Pet. App. 39a-40a, 42a ("Indeed, the primary purpose of a press release is to distribute information to the press for publication."). For that reason, a faithful application of the Ohio Supreme Court's decision in *Fallang* would lead to a determination that the Due Process Clause permits the assertion of personal jurisdiction over Respondents in this case.

The existence of conflicting decisions between the Federal Court of Appeals and the highest state court with jurisdiction over the State of Ohio and its citizens presents an entirely sufficient ground for granting certiorari in this case. *See, e.g., Madsen v. Women's Health Center*, 114 S. Ct. 2516, 2522-23 (1994) (writ of certiorari granted to resolve conflict between Eleventh Circuit Court of Appeals and Florida Supreme Court).

CONCLUSION

For the foregoing reasons, as well as those presented by Petitioner, the amici States respectfully request that the Court grant a writ of certiorari in this case to review the decision of the United States Court of Appeals for the Sixth Circuit.

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October 5, 1994

Supreme Court, U.S.
FILED
OCT 12 1994
OFFICE OF THE CLERK

No. 94-410

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HARRY L. REYNOLDS, JR.,
Petitioner,
v.
INTERNATIONAL AMATEUR ATHLETIC FEDERATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In its Brief in Opposition, the IAAF argues that this case is not suitable for review because (1) an independent state ground exists to justify the court of appeals' decision, (2) the decision of the court below was grounded in a "fact-based analysis," and (3) considerations unique to the athletic nature of the activity it regulates and coordinates make judicial intrusion of any kind unworkable. None of these assertions has merit.

I.

No independent state law ground supports the Sixth Circuit decision. The Sixth Circuit simply did not rely on the Ohio long-arm statute to determine jurisdiction with respect to Reynolds' intentional tort claims.[1] To the contrary, it explicitly held that adjudication of those claims in Ohio did not satisfy the requirements of due process.

The very language of the Sixth Circuit's analysis makes this plain. App. 18a-20a. At the threshold it observed that the district court had premised jurisdiction on "the provision of the Ohio long-arm statute which provides that

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[1] Contrary to the IAAF's claim, the "tort" at issue here is not just a single defamatory press release. Reynolds alleged the two intentional torts of defamation and tortious interference with business relations. Each of those claims encompassed the IAAF's repeated false statements that Reynolds had tested positive for steroid use, its active obstruction of Reynolds' ability to compete for over two years, including in the 1992 Olympic Games, and its interference with Reynolds' numerous endorsement contracts. The district court considered all of this conduct and granted relief on both claims, premising personal jurisdiction over the IAAF upon the Ohio statute that covers intentional torts causing injury in Ohio. App. 39a-40a, 55a-56a, 85a-86a. The Sixth Circuit overturned the district court judgment with respect to both intentional tort claims based on the due process analysis that is the subject of Reynolds' petition to this Court. *See* App. 20a. As is evident from his Question Presented, Reynolds seeks this Court's review and reversal with respect to both claims. The IAAF is flatly wrong in asserting that Reynolds has in any way abandoned his tortious interference claim in this proceeding.

a party is amenable to suit by 'causing tortious injury in this state . . . by an act outside this state.' O.R.C. § 2307.382(A)(6)." App. 18a. Acknowledging that a tort action can be brought where the injury is suffered, the court went on to summarize some of the fact findings upon which the district court had based its exercise of jurisdiction:

> Reynolds claimed a loss of more than $4,000,000 in Ohio because of the IAAF's false press release and the district court specifically found that the injury to Reynolds was in Ohio, holding "[t]he IAAF intentionally and purposefully directed their tortious acts toward Plaintiff, and such acts had a devastating effect upon plaintiff."

App. 18a. The circuit court accepted these findings without question. Nonetheless it declared:

> More needs to be demonstrated, however. The question remains whether the IAAF, in making the alleged defamatory statements in England, had *minimum contacts* with Ohio.

App. 19a (emphasis added). With that the Sixth Circuit began its due process analysis, which revolved around *Calder v. Jones*, 465 U.S. 783 (1984), and the core constitutional question of what "minimum contacts" are sufficient. The court's judgment that the IAAF could not be sued in Ohio for defamation and tortious interference rested solely on its holding that due process was not satisfied in the absence of particular facts that it noted were present in *Calder*. App. 19a-20a.[2]

Moreover, under *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), the Sixth Circuit could not have applied the

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[2] As a practical matter, due process determines both the statutory and the constitutional limits of jurisdiction in Ohio. Because Ohio's long-arm statute and rule authorize jurisdiction to the full extent that due process allows, "an Ohio personal jurisdiction analysis becomes an examination of constitutional limitations." *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1167 (6th Cir. 1988) (citation omitted). *Accord, Columbus Show Case Co. v. CEE Contracting, Inc.*, 599 N.E.2d 881, 884 (Ohio Ct. App. 1992).

Ohio long-arm statute to preclude jurisdiction because the Ohio Supreme Court has determined that the long-arm statute is satisfied when a defamatory statement is published in Ohio resulting in injury to the reputation of an Ohio resident. *Fallang v. Hickey*, 532 N.E.2d 117 (Ohio 1988). *Fallang* was a defamation action in which the Ohio Supreme Court upheld jurisdiction under the state long-arm statute [3] and the Due Process Clause based on contact factors identical to those here. 532 N.E.2d at 118-20 (citing *Calder*).[4]

Accordingly, due process was the only basis on which the Sixth Circuit could possibly have denied jurisdiction,[5] and it was the sole basis for the court's decision.

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[3] *Fallang v. Hickey*, 532 N.E.2d 117 (Ohio 1988), literally relied on Ohio R. Civ. P. 4.3, which has been held coextensive with the long-arm statute set forth in Ohio Rev. Code Ann. § 2307.382. *U.S. Sprint Comm. Co. v. Mr. K's Foods, Inc.*, 624 N.E.2d 1048, 1051 n.2 (Ohio 1994) (quoting *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 559 N.E.2d 477, 479 (Ohio 1990), *cert. denied*, 499 U.S. 975 (1991)).

[4] In *Fallang*, the intentional nature of the tort of libel satisfied long-arm standards, just as it had satisfied due process standards in *Calder v. Jones*, 465 U.S. 783 (1984). Thus, the IAAF gains nothing by arguing that the district court finding of malice does not establish the intent required by the long-arm statute. Brief for Resp't in Opp. ("Res. Br.") at 12-13 n.13. Contrary to the IAAF's assertion, it makes no difference whether the IAAF's *motive* was principally to injure Reynolds or to protect the credibility of its testing laboratory, just as it made no difference in *Calder* whether the defendants' *motive* was to injure Shirley Jones or to enhance their own journalistic reputations and increase sales of the *National Enquirer*. In both cases, the alleged torts were intentional by nature, and it is that intentional nature that justifies holding defendants accountable for the resulting injury wherever it predictably occurs.

[5] Its due process ruling, however, placed the Sixth Circuit in conflict with the Ohio Supreme Court, creating an independent basis for review. *See* Brief for the States of Ohio and Mont. as *Amici Curiae* in Supp. of Pet'r at 26-27. If the decision below is allowed to stand, it will be possible for a plaintiff to sue a nonresident intentional tortfeasor in an Ohio state court, properly invoking its personal jurisdiction under *Fallang*, only to have the defendant

II.

The IAAF seeks to trivialize the issues at stake here by describing the Sixth Circuit ruling as a "fact-bound analysis." The detail of its description, however, illustrates most clearly that the lower courts addressing intentional tort claims are divided about the due process implication of plaintiff's residence in the forum and the significance, if any, of the additional contact factors mentioned in *Calder*.

The essential rule of *Calder* was stated in its concluding paragraphs:

> In this case, petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis.
>
> * * * *
>
> We hold that jurisdiction over petitioners in California is proper because of their intentional conduct in Florida calculated to cause injury to respondent in California.

465 U.S. at 790-91. This language suggests that directing an intentional tort at an individual makes it predictable that the individual will be injured in his state of residence, such that the intentional tortfeasor can be said to have "purposely availed" himself of the privilege of causing effects in that forum and should reasonably expect to be haled into court there. So stated, the due process standard of *Calder* plainly supports Ohio's assertion of jurisdiction over the IAAF in the present case.

The *Calder* opinion, however, did also identify other contact factors linking the defendants to the forum in that case, without addressing the constitutional significance of those contacts. The Court observed:

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television

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remove to federal court and obtain dismissal under the Sixth Circuit ruling in *Reynolds*. This is manifestly intolerable.

> career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered.

Id. at 788-89.

This language logically accounts for treating an individual plaintiff's home state as a place where he will predictably be injured by defamation and also for why a plaintiff should be permitted to sue there. The lower courts, however, have not uniformly adopted that view. Some courts have interpreted *Calder* as holding that intentionally targeting an individual *plaintiff* is enough to constitute "purposeful availment" of the forum where that plaintiff resides.[6] Others have required additional evidence that the intentional tortfeasor aimed his conduct at the forum *territory* as such—*i.e.*, evidence that defendant knew the plaintiff was a forum resident and/or knew the defamatory communication or other harmful agent was likely to enter the forum.[7] Still others have used language argu-

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[6] *Carteret Savs. Bank, F.A. v. Shushan*, 954 F.2d 141, 148 (3d Cir.), *cert. denied*, 61 U.S.L.W. 3256 (1992) ("[t]hat the article might harm the plaintiff, a California resident, in her home state should be sufficiently foreseeable, such that haling the defendant into court in the forum state would not violate notions of fair play and substantial justice"); *Burt v. Board of Regents of the Univ. of Neb.*, 757 F.2d 242, 245 (10th Cir. 1985), *vacated on other grounds*, 475 U.S. 1063 (1986) ("no due process notions of fairness are violated by requiring one who intentionally libels another to answer for the truth of his statements in any state where the libel causes harm to the victim"). *See also First American First, Inc. v. National Ass'n of Bank Women*, 802 F.2d 1511, 1517 (4th Cir. 1986) ("NABW knew or should have known that its allegedly defamatory letters [distributed nationally] would inflict the greatest injury upon Leake in the state in which he resided and conducted his business").

[7] *See Core-Vent Corp. v. Nobel Indus., AB*, 11 F.3d 1482, 1486 (9th Cir. 1993); *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1201 (9th Cir. 1988) (imputing knowledge of plaintiff's residence to foreign defendant through its agent). *Cf. Core-Vent*, 11 F.3d at

ably consistent with both views.[8] This case is the only one, however, in which a circuit court's holding has relegated the state of plaintiff's residence to a "mere fortuity" in the jurisdictional analysis. See Res. Br. at 14.

Another source of disparity among lower courts has been *Calder*'s observation that California was "the focal point," not only of the harm to plaintiff, but of the defamatory report itself. See *Core-Vent Corp. v. Nobel Indus., AB,* 11 F.3d 1482, 1486, 1492 (9th Cir. 1993) ("[u]nlike in *Calder,* the articles cannot be seen as a comment on a California event"; dissent says *Calder* did not rely on this factor); *Norris v. Oklahoma City Univ.*, 1994 U.S. App. LEXIS 7975 (9th Cir. Apr. 5, 1994) ("although appellee sent the transcripts to a California audience, the transcripts themselves concerned Norris's grades and achievements in Oklahoma . . . ."); *Burt v. Board of Regents of the Univ. of Neb.*, 757 F.2d 242 (10th Cir. 1985), *vacated on other grounds,* 475 U.S. 1063 (1986) (finding jurisdiction in Colorado although "the 'focal' point of the story was Nebraska"; dissent chided, "We thus have but half a *Calder*"). Until this case, however, no circuit court had used "the focal point of the story" as grounds for denying an individual plaintiff access to the courts of his home state.

Lower courts have also differed over the constitutional importance to be placed on *Calder*'s observation that the *National Enquirer* had its widest circulation in California.

1492 (dissent argued such knowledge was "not a prerequisite" in *Calder*).

[8] *See e.g., Hugel v. McNell,* 886 F.2d 1, 5 (1st Cir. 1989), *cert. denied,* 494 U.S. 1079 (1990) ("[t]he McNells knew that the release of the allegedly false information would have a devastating impact on Hugel, and it can be fairly inferred that they intended the brunt of the injury to be felt in New Hampshire where Hugel had an established reputation as a businessman and public servant."); *Brainerd v. Governors of the Univ. of Alberta,* 873 F.2d 1257, 1259 (9th Cir. 1989); *Lake v. Lake,* 817 F.2d 1416, 1423 (9th Cir. 1987); *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.,* 784 F.2d 1392, 1398 (9th Cir. 1986).

In context, *Calder* apparently treated this fact as an additional indicator that the libel would predictably injure the plaintiff in her home state. See 465 U.S. at 489. *Accord, Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1391 (8th Cir. 1991) ("[t]he fact that some of the 'passing off' occurred in South Dakota, along with the fact that Industries' principal place of business is in South Dakota, demonstrates that Sportswear's actions were uniquely aimed at the forum and that the 'brunt' of the injury would be felt there, as required by *Calder*"). Numerous lower courts, however, have inferred that the newspaper's circulation had broader significance in the *Calder* due process analysis.[9] This case is the first to require not only that defamatory statements be published in the forum, but also that the defendant publish them there personally.[10] *Contra, Hugel v. McNell*, 886 F.2d 1 (1st Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990); *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1197-98 (9th Cir. 1988).

Given the diverse applications of *Calder* by the lower courts, it is no hindrance to this Court's review that the Sixth Circuit purported to "distinguish" *Calder* on factual grounds. To the contrary, the Sixth Circuit holding offers this Court an ideal occasion to clarify the demands of due process in the intentional tort setting. By elevating *Calder*'s additional facts to a jurisdictional standard, the Sixth Circuit has sharply illuminated the need for guidance by this Court as to the limits that confine a state's power to adjudicate the claims of its own citizen against a foreign intentional tortfeasor.

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[9] *See Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club*, 1994 U.S. App. LEXIS 21817, at *5 (7th Cir. Aug. 12, 1994) (television broadcasts would constitute "entry" into forum if *Calder* requires "entry"); *Casualty Assurance Risk Ins. Brokerage Co. v. Dillon*, 976 F.2d 596, 599-601 (9th Cir. 1992); *Hicklin Eng'g, Inc. v. Aidco, Inc.*, 959 F.2d 738, 739 (8th Cir. 1992).

[10] There is, of course, no question here that the defamatory statements were actually published in Ohio, as acknowledged by the Sixth Circuit itself. App. 19a.

III.

The IAAF has also asserted that, because its decisions involve the regulation and coordination of a world-wide sporting activity, it should not be subject to the judicial power of any one nation. It also claims that its own arbitration procedures provide an independent review of its decisions. These "policy" arguments, however, are fatally flawed in several respects.

First, the mere fact that the IAAF regulates sporting activity and derives its income from such regulation does not, under the Due Process Clause, give it special immunity from the judicial processes of this Country.[11] To hold otherwise would allow entities like the IAAF to act with complete impunity, leaving American citizens under their power without any realistic prospect of redress for even the most damaging intentional wrongdoing. See Brief for the States of Ohio and Mont. as *Amici Curiae* in Supp. of Pet'r at 13-14.

Second, resolution of the important jurisdictional question presented here will not inhibit the proper regulation of sport any more than the Court's decision in *International Shoe* inhibited the orderly development of interstate and international commerce. Many multinational business entities carry on extensive commercial operations in numerous countries and, in the course of doing so, adhere to the laws and customs of each such country individually. *Barclays Bank, Plc. v. Franchise Tax Bd.*, 113 S. Ct. 2268 (1994).

Third, the IAAF's existing "arbitration" procedures do not provide a fair and independent means by which IAAF eligibility decisions can be reviewed. As the district court recognized, the sham nature of the "arbitration" conducted in this case was evidenced by, among other things, the

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[11] *See Nehemiah v. The Athletics Congress of the United States, Inc.*, 765 F.2d 42, 48 (3d Cir. 1985) ("[n]or do we find persuasive IAAF's argument that it would be 'intolerable' as a matter of domestic and international law to subject it to jurisdiction *anywhere* in the United States").

IAAF's persistent refusal to disclose critical exculpatory evidence concerning Reynolds, the tribunal's refusal to consider relevant scientific evidence at all, and the IAAF's repeated statements and suggestions to Reynolds that any challenge to his suspension would ultimately be futile. App. 61a-65a.

The "arbitration" tribunal in this case was, in addition, not independent in any sense of that term, but rather was simply a part of the IAAF. It was composed of three members selected by the IAAF from an existing six-member committee of the IAAF itself. The General Secretary of the IAAF controlled all communications with the tribunal selected for this case. Neither TAC nor Reynolds had any role in the selection process whatsoever.[12]

Fourth, contrary to the IAAF's claim, this case does not involve the potential for displacement of existing IAAF rules. In *Reynolds I*, the district court and the Sixth Circuit required Reynolds to exhaust his administrative remedies prior to seeking any judicial relief and he did so. His state law causes of action in *Reynolds II* were narrowly tailored to address the IAAF's failure to follow its own rules and the harm to him arising out of those

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[12] Reynolds was not obligated, as the IAAF now suggests, to request that English courts set aside the "arbitration" decision pursuant to the United Nations (New York) Convention on the Recognition and Enforcement of Arbitral Awards, 21 U.S.T. 2517 (1958), reported at 9 U.S.C. § 201 ("Convention"). The Convention only applies where an agreement to arbitrate involves a "commercial" dispute and is in writing and signed by both parties—preconditions that were not present in this case. App. 8a. Moreover, irrespective of whether Reynolds was empowered or obligated to request that the "arbitration" decision be set aside, he was and is able to contest its applicability to him in this country. The Convention makes it clear that the courts of every signatory country may determine the extent to which any arbitral award qualifies for recognition and preclusive effect within its boundaries. The district court in this case did not "vacate" the London arbitration decision in any sense which the Convention embodies. It simply declined to give the award preclusive effect in the United States for the reasons identified in its decision.

failures, including the IAAF's purposeful avoidance of the fact of his innocence in order to protect the credibility of its affiliated laboratory. App. 67a.

CONCLUSION

For all of the foregoing reasons, review by this Court of the ruling below will appropriately resolve the conflicts among the circuits respecting the scope and application of *Calder*. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 12, 1994